

86-780

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1986

BRONSON C. LA FOLLETTE,
ATTORNEY GENERAL OF WISCONSIN,

Petitioner,

v.

BURLINGTON NORTHERN
RAILROAD COMPANY and
BURLINGTON NORTHERN DOCK CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE WISCONSIN SUPREME COURT

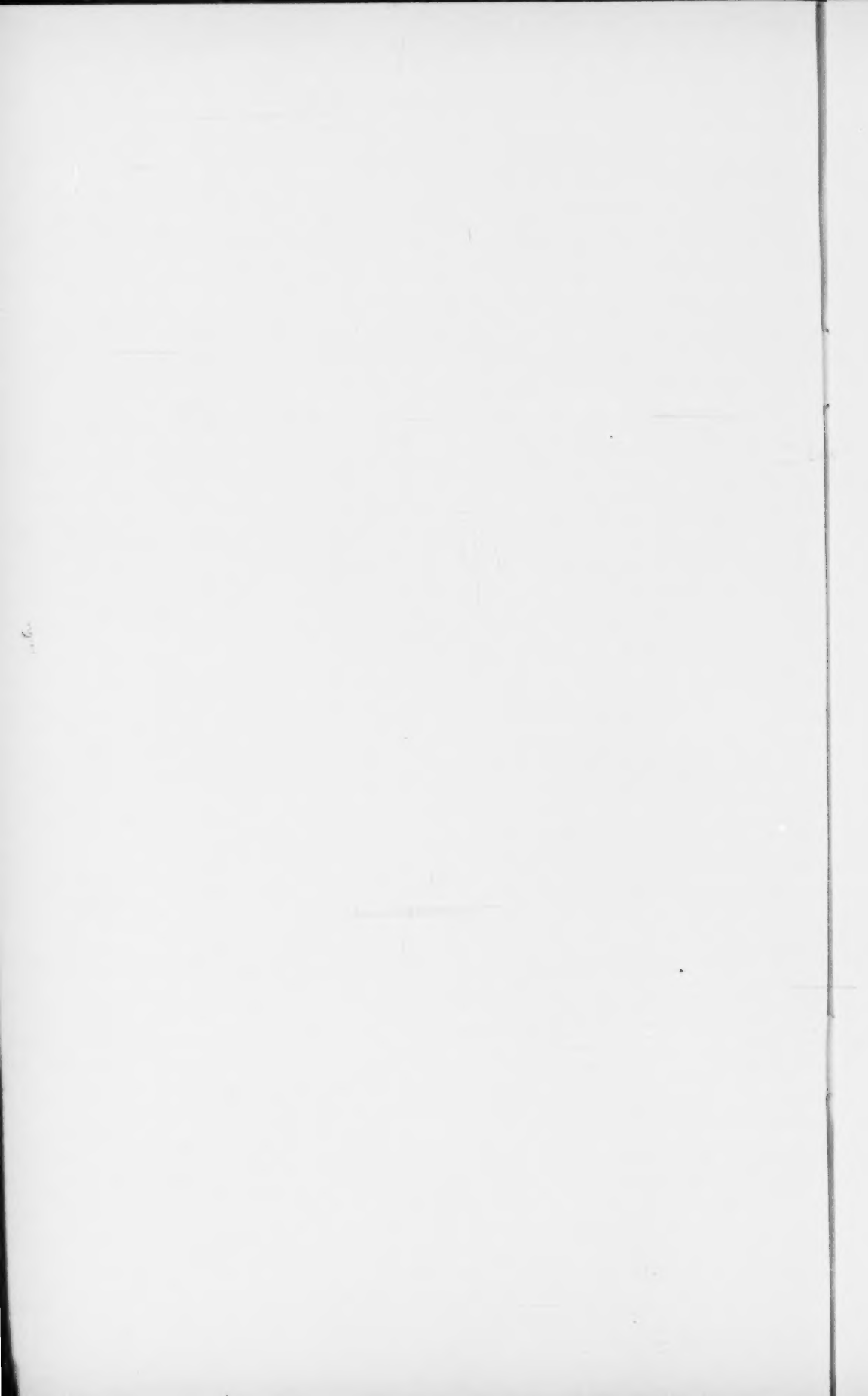
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November, 1986

34/24



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QUESTION PRESENTED

Does a state tax statute which on its face arguably favors local business at the expense of interstate commerce violate the Commerce Clause if in fact the tax has no discriminatory effect whatsoever?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Bronson C. La Follette, Attorney General of Wisconsin, the respondents, Burlington Northern Railroad Company and Burlington Northern Dock Corporation (together hereinafter referred to as "Burlington Northern") and the City of Superior, Wisconsin.¹

¹The lower court caption includes Burlington Northern, Inc., the prior name of the present Burlington Northern Railroad Company. The lower court caption does not include the Wisconsin Attorney General, who was not named in Burlington Northern's pleadings, but who entered the case as a matter of right under state law because the constitutionality of a state statute was at issue. The City of Superior, which collected the tax which is the subject of this litigation, was the only named defendant below.

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OPINIONS AND OTHER LOWER COURT PAPERS

The opinion of the Wisconsin Supreme Court is reported at 131 Wis. 2d 564, 388 N.W.2d 916 (1986), and is reprinted in the appendix hereto at 101.

The order of the Wisconsin Supreme Court denying the Attorney General's motion for reconsideration is unreported. It is reprinted in the appendix at 155.

The opinion of the Court of Appeals of Wisconsin, certifying the case to the Wisconsin Supreme Court, is unreported. It is reprinted in the appendix at 159.

The Memorandum Decision, Findings of Fact, Conclusions of Law and Final Judgment of the Circuit Court of Douglas County, Wisconsin (the trial court), are unreported. They are reprinted in the appendix at 164 - 202, except for

the parties' stipulation of facts and exhibits thereto, incorporated by reference by the trial court as its findings.

STATEMENT OF JURISDICTION

The Wisconsin Supreme Court rendered its decision reversing the judgment of the state circuit court and invalidating Wis. Stat. § 70.40 (1983-84), on the sole ground that the statute violated United States Constitution art. I, § 8, cl. 2, the Commerce Clause, on June 25, 1986. The court denied the Attorney General's timely motion for reconsideration by order dated August 15, 1986. This court has jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION AND
STATUTES INVOLVED

United States Const. art. I, § 8,
cl. 2

The congress shall have
the power

3. To regulate commerce
with foreign nations, and among
the several states, and with
the Indian tribes; . . .

Wis. Stat. § 70.40 (1983-84)

(Text set forth in the appendix
hereto at 108.)

1985 Wisconsin Act 29, §§ 1216b and
1216d, amending Wis. Stat. § 70.40
(1983-84).

(Text set forth in the appendix at
205.)

STATEMENT OF THE CASE

Burlington Northern operates dock
facilities on Lake Superior in the City
of Superior, Wisconsin. Burlington
Northern trains haul taconite pellets to
the dock facilities from Minnesota,
where the raw material is mined and
processed. The taconite pellets are

stored at the docks until they can be loaded onto barges for shipment to Canada and to Great Lakes ports outside of Wisconsin.

Wisconsin imposes an occupational tax on the operation of iron ore concentrates (which includes taconite) docks. Wis. Stat. § 70.40 (1983-84). The tax is measured by the volume of material handled.

Until recently, the statute exempted from the quantity of material used to measure the tax, any iron ore concentrates subject to Wisconsin's occupational tax (Wis. Stat. §§ 70.37-70.395) on the mining in Wisconsin of metallic minerals. The statute also contained other exemptions not relevant to this petition.

During the period in question (May 1, 1977 through December 31, 1980),

Burlington Northern paid, under protest, a total of close to \$2 million in dock taxes to the City of Superior which, pursuant to the statute, retained 70% and forwarded the remainder to the state, which allocated 10% to its general fund and the remaining 20% to a trust fund for grants to alleviate the adverse effects of metalliferous mining.

Burlington Northern passed along the taxes it paid as the operator of the docks to its customers, which are steel companies in states other than Wisconsin.

Burlington Northern sued for a tax refund.² The trial court, on stipulated

²Burlington Northern raised several grounds not relevant to this petition. In addition to claiming that the dock tax discriminated against interstate commerce, Burlington Northern claimed that the tax violated the other prongs of Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) and violated the import-export clause.

facts, concluded that the statute discriminated against interstate commerce but severed the offending exemption and upheld the tax. The state intermediate appellate court certified Burlington Northern's appeal to the Wisconsin Supreme Court.

The Wisconsin Supreme Court held that the effect of the dock tax was to discriminate against out-of-state taconite producers, which indirectly paid the tax on the shipment by Burlington Northern of their taconite, in favor of their "W'sconsin counterparts" in violation of the commerce clause. Burlington Northern v. Superior, 131 Wis. 2d 564, 576, 388 N.W.2d 916 (1986) (Appendix hereto at 101).

The court also held that the purpose of the exclusion from the measure of the tax of Wisconsin mined ore, which is subject to the separate metallic minerals mining tax, was to favor Wisconsin producers. The court declined to sever the exemption and struck down the tax.

During the years in question, Burlington Northern was the only iron ore concentrates dock subject to the Wisconsin tax, and only one mining company was subject to Wisconsin's metallic mineral mining tax. That company was wholly owned by one of Burlington Northern's customers. None of its ore was shipped over Burlington Northern's docks.

The objectionable exemption was repealed by the Wisconsin Legislature while the appeal was pending.

The Attorney General asked the Wisconsin Supreme Court to reconsider its decision on two grounds: (1) that the court misconstrued the uncontested material facts which establish that during the entire life of the exemption for Wisconsin-mined ore, no person or company was benefited because the only taconite produced in Wisconsin was mined by a subsidiary of one of Burlington Northern's customers and shipped by rail, not by barge over Burlington Northern's docks; and (2) because the court erred in interpreting this Court's decisions as requiring the invalidation of state taxes, the purpose of which may arguably be to favor local over out-of-state business, irrespective of the taxes' actual effect upon commerce. The court denied reconsideration without discussion.

REASONS FOR GRANTING THE WRIT

- I. THE WISCONSIN SUPREME COURT'S DECISION IS A THROWBACK TO AN ERA DURING WHICH ECONOMIC REALITIES WERE IGNORED IN FAVOR OF FORMALISM.

Since Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), this Court has rejected Commerce Clause decisions which bore "no relationship to economic realities." Id. at 279. In the present case the Wisconsin Supreme Court ignored the stipulated facts which established that any discrimination against interstate commerce was theoretical; that in fact no local business was favored in any manner during the entire period of time in which the challenged statutory exemption existed.

This is an era of disappearing state reliance upon federal financial assistance. Witness the elimination of revenue sharing and the restraints

imposed by the federal deficit. State legislatures must make the tough taxing and spending decisions necessary to finance legitimate state and local activities.

A prime economic attraction of the City of Superior is its port facilities on the largest of our Great Lakes. Users of this valuable natural resource are asked to pay their fair share of the costs occasioned by massive port facilities, such as Burlington Northern's \$70,000,000 facility, through the payment of occupational taxes. By this reasonable financing device, the state has provided for needed local revenue at the local level, revenue related to local activities, and without state or federal assistance. It is ironic that the federal constitution should be the basis for invalidating such a plan, when it is

uncontested that in actual economic effect the tax discriminates against nobody.

Financing schemes such as this one should be encouraged. This Court can do so by rejecting erroneous applications of the Commerce Clause such as the decision of the Wisconsin court in this case.

II. THE WISCONSIN SUPREME COURT'S DECISION OVERLOOKED AND MISCONSTRUED SIGNIFICANT AND CONTROLLING FACTS APPEARING IN THE RECORD IN DECIDING THAT THE STATUTE WAS DISCRIMINATORY IN EFFECT.

The court decided that Wis. Stat. § 70.40 discriminated against out-of-state mining companies in favor of Wisconsin mining companies. More specifically, the court found that the exclusion of Wisconsin-mined ore from the measure of the occupational tax imposed by the statute has a discriminatory effect on

interstate commerce; that the effect is to enhance or encourage Wisconsin's mining industry; that Wisconsin taconite is more attractive to mine than out-of-state ore; and that out-of-state taconite is more expensive than Wisconsin taconite.

Not only are none of these findings of fact supported by the record, the opposite are conclusively established.³

All that the record revealed about a Wisconsin taconite industry is that one company -- the Jackson County Mining Company -- mined and produced taconite

³The trial court, which agreed that the statute was unconstitutional because of the exclusion for Wisconsin taconite, did not make the findings of fact the supreme court made. The lower court adopted the parties' stipulation, which contained no such facts. In its decision, the trial court stated an additional finding: that "the exemption [for Wisconsin-mined ore] has never been used"

during the taxable periods in question; that it paid \$9,653 in mining taxes during that period; that none of its taconite was handled by Burlington Northern over the Superior docks; and that it closed down in 1983, leaving no operating taconite mines in Wisconsin.

No court could reasonably conclude based on these facts that Wisconsin's mining industry, such as it was, was affected at all by the statute, let alone encouraged and enhanced by it. We do not know when the Jackson County Mining Company started mining; why it mined where it did; why it shipped its product by rail rather than by barge;⁴ where it

⁴If it is fair to deduce anything about this subject, it is reasonable to assume that the Jackson County Mining Company mined in Jackson County, located in the center at the state, nowhere near a Great Lakes port, and that it would have made no sense to ship its ore to Superior for transport out-of-state.

shipped to; what its cost of shipment was; or what the cost of its products was. All we know is that it paid less taxes to Wisconsin than Minnesota mining companies paid. But this fact has nothing to do with the statute.

Had the exemption for Wisconsin taconite never existed, the Jackson County Mining Company would have paid exactly the same amount of taxes, because the ore was shipped by rail, not barge, and therefore never benefited from the dock tax exemption. Similarly, had the exemption never existed, Minnesota mining companies (to whom Burlington Northern passed along the dock tax) would still have paid the same amounts they did pay. The statute's exemption had no effect upon Wisconsin mining operations

relative to out-of-state mining operations.

Theoretically, the statute could have had an effect. If Jackson County had used the Burlington Northern docks, it would not have paid a dock tax because of the statutory exclusion of Wisconsin-mined ore. But theoretical favors do not amount to discrimination. All existing precedent support this proposition.

As early as 1940, this Court stated:

The freedom of commerce which allows the merchants of each state a regional or national market for their goods is not to be fettered by legislation, the actual effect of which is to discriminate in favor of intrastate businesses

Best & Co. v. Maxwell, 311 U.S. 454, 457 (1940) (emphasis added). The analysis was stated in Maryland v. Louisiana, 451 U.S. 725, 757 (1981) this way:

A state tax must be assessed in light of its actual

effect considered in conjunction with other provisions of the State's tax scheme. 'In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.'

(Emphasis added.) Complete Auto, 430 U.S. 274, resoundingly rejected prior court decisions which bore "no relationship to economic realities." Id. at 279. The Court observed the trend "toward a standard of permissibility of state taxation based upon its actual effect rather than its legal terminology." Id. at 282.

There is no economic consequence that follows necessarily from the use of . . . particular words . . . and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect.

Id. at 289 (emphasis added). In Dept. of Rev., etc. v. Ass'n of Wash. State. Co.,

435 U.S. 734 (1978), which considered port operations virtually identical to those of Burlington Northern in Superior, the Court reiterated that the focus is upon the practical effect of a challenged tax statute and concluded that the taxpayer there had failed to prove its case as a matter of fact:

Respondents proved no facts in the Superior Court that, under the above test, would justify invalidation of the Washington tax. The record contains nothing that minimizes the obvious nexus between Washington and respondents; indeed, respondents conduct their entire stevedoring operations within the State. Nor have respondents successfully attacked the apportionment of the Washington system. The tax under challenge was levied solely on the value of the loading and unloading that occurred in Washington. Although the rate of taxation varies with the type of business activity, respondents have not demonstrated how the 1% rate, which applies to them and generally to business rendering services, discriminates against interstate

commerce. Finally, nothing in the record suggests that the tax is not fairly related to services and protection provided by the State. In short, because respondents relied below on the per se approach of Puget Sound and Carter & Weekes, they developed no factual basis on which to declare the Washington tax unconstitutional as applied to their members and their stevedoring activities.

Id. at 751-52 (emphasis added).

The simple point is that Burlington Northern, like the Washington stevedores, has no case in fact. The exemption had no effect on the cost of mining taconite in Wisconsin because it was never applied to taconite mined in Wisconsin.

As of 1985, the exemption was removed from the statute. Thus, prospectively, there can never be discrimination because Wisconsin-mined ore, if ever there is any, will be treated exactly like out-of-state ore insofar as the dock tax is concerned.

For this reason, the Court can only conclude that the statute will never have the effect of discrimination.

Finally, even if the statute had in fact affected the Jackson County Mining Company, by lowering its costs relative to the costs of Minnesota mining companies, there still would have been no discrimination in effect. The parties stipulated that the Jackson County Mining Company was owned outright by the same corporation which owned one of the Minnesota mining companies. In other words, the only possible beneficiary of the exemption was owned by the same corporation which the lower courts had found to be a victim of the exemption.

In finding discrimination in fact in this case, the Wisconsin Supreme Court overlooked and misconstrued the record,

to the advantage of Burlington Northern, which was never discriminated against because no one was ever favored. The decision bears "no relationship to economic realities," Complete Auto, 430 U.S. at 279, and should not stand.

III. THE WISCONSIN SUPREME COURT OVERLOOKED CONTROLLING LEGAL PRECEDENT IN CONCLUDING THAT DISCRIMINATORY PURPOSE WILL INVALIDATE A STATUTE IRRESPECTIVE OF THE STATUTE'S EFFECT.

The court not only ruled that Wis. Stat. § 70.40 discriminated in effect; it ruled that the statute was discriminatory "on the basis of [its] . . . purpose" This amounts to holding that the statute is unconstitutional on its face, regardless of its effect. This is contrary to recent decisions of this court.

The Wisconsin court cited Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104

S. Ct. 3049 (1984) for the proposition. The citation was correct, but out of context.

In Bacchus, the state asked the Court to take a "flexible approach" and balance the "relative burden" on interstate commerce with the state's economic objectives. The Court refused to proceed in this fashion because of the statute's discriminatory purpose (to promote a fledgling wine industry). Id. at 3055. But the Court was not saying that discriminatory purpose necessarily dooms a statute. Discriminatory purpose just renders unavailable any balancing of the statute's effect with the state's objectives. Effect is still relevant. The facts of Bacchus demonstrate this. The state did not contend, as we contend here, that the statute did not in fact burden interstate commerce at all; it

contended a relatively minimal effect. The Court refused to weigh the extent of the burden but it assumed some burden, and expressly looked for, and found, discriminatory effect. Id. at 3056.

In all other cases we have been able to find, purpose alone did not doom a statute. In Hunt v. Washington State Apple Advertising Com'n, 432 U.S. 333 (1977), cited in Bacchus, the Court found discrimination in effect. In City of Philadelphia v. New Jersey, 437 U.S. 617 (1978), the Court stated the rule as follows: "[W]here simple economic protectionism is effected . . . a virtually per se rule of invalidity has been erected." Id. at 625. Discrimination in fact was assumed. Id. at 626.

In Westinghouse Elec. Corp. v. Tully, 466 U.S. 388, 104 S. Ct. 1856 (1984), the Court found that the purpose

of the statute in question was to favor local industry at the expense of other states but went on to discuss the "discriminatory economic effect" of the statute and to reject "formalistic distinctions that lack economic substance." Like Hawaii in Bacchus, New York in Tully argued that the burden on interstate commerce was "slight." The Court refused to weigh and balance but still insisted upon proof of some burden in fact. Id. at 1867.

In Armco v. Hardesty, 467 U.S. 638, 104 S. Ct. 2620 (1984), the Court, while not requiring the challenging taxpayer to point to taxes in other states resulting in a total higher burden than its competitors, did not do so because it found an "obvious burden." Id. at 2624.

In Williams v. Vermont, ___ U.S. ___, 105 S. Ct. 2465 (1985), the Court held that a Vermont statute creating a tax

credit for residents was on its face "an arbitrary distinction that violates the Equal Protection Clause." Id. at 2471. Yet, the Court explicitly noted that it was not deciding that under no circumstances could the statute be enforced:

In addition, we note that this action was dismissed for failure to state a claim before an answer was filed. The "dominant theme running through all state taxation cases" is the "concern with the actuality of operation." Halliburton, 373 U.S., at 69, 83 S.Ct., at 1203. It is conceivable that, were a full record developed, it would turn out that in practice the statute does not operate in a discriminatory fashion.

Id. at 2474 (emphasis added).⁵

⁵The citation to Halliburton, a Commerce Clause case, makes it clear that the rule of Williams is not limited to Equal Protection Clause claims.

In our case, a full record was developed, and it does turn out that in practice the statute did not discriminate. According to Williams, that the statute on its face may have permitted discrimination is of no consequence.⁶

Most recently, in Brown-Forman Distillers v. N.Y. State Liquor Auth., ____ U.S. ____, 106 S. Ct. 2080 (1986), the court reaffirmed that "the critical consideration [in commerce clause challenges] is the overall effect of the statute on both local and interstate activity." Id. at 2084.

⁶The dissent in Williams would have upheld the tax as a matter of law, finding only "phantom beneficiar[ies] of Vermont's discrimination." Id. at 2476. The dissent agreed with the majority that if a "hypothetical Vermonter is not entitled to the [credit], the discrimination disappears." Id. at 2476.

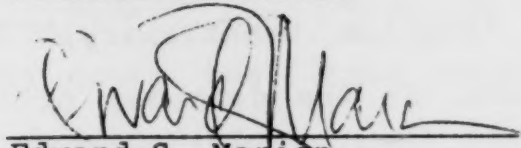
To ask the Court to insist upon proof of discrimination in fact is not to insist that the validity of the statute be held to depend "upon the vicissitudes of business decisions," as Burlington Northern has argued. We have a fixed system here. The statute did not discriminate in the past and, because the exemption has been repealed, cannot discriminate in the future. On the basis of a "phantom beneficiary," Burlington Northern, as the defender of the rights of Minnesota mining companies, will reap a windfall refund, notwithstanding the total absence of any practical economic consequences as a result of treatment of Wisconsin-mined ore.

CONCLUSION

For the above-argued reasons, we respectfully ask the Court to review and reverse the decision of the Wisconsin Supreme Court.

Dated: November 5, 1986.

Bronson C. La Follette
Attorney General of Wisconsin
Counsel of Record

A handwritten signature in dark ink, appearing to read "Edward S. Marion", written over a horizontal line.

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Respondents.

SEPARATE APPENDIX TO PETITION
FOR A WRIT OF CERTIORARI TO
THE WISCONSIN SUPREME COURT
(VOLUME I)

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and 1216d, amending Wis.
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BURLINGTON NORTHERN, INC. and
Burlington Northern Dock Corporation
Plaintiffs-Appellants,

v.

The CITY OF SUPERIOR, Wisconsin
Defendant-Respondent. [Case Nos.
84-2358, 84-2359.]

BURLINGTON NORTHERN RAILROAD
COMPANY and Burlington Northern Dock
Corporation, Plaintiffs-Appellants

v.

The CITY OF SUPERIOR, Wisconsin,
Defendant-Respondent. [Case Nos.
84-2360, 84-2361.]

Supreme Court

Nos. 84-2358, 84-2359, 84-2360,
84-2361. Argued June 3, 1986. --
Decided June 25, 1986

(On certification from court of appeals)

1. Constitutional Law § 32* --
compatibility of tax statute --
constitutional question -- scope of
review.

Trial court's determination of tax
statute's compatability with

* See Callaghan's Wisconsin Digest,
same topic and section number.

commerce clause of federal Constitution is constitutional question and reviewing court will review such question independent of determination of lower courts.

2. **Taxation § 1* -- commerce clause challenge -- sustainability.**

State tax is generally sustainable against commerce clause challenge when tax is applied to activity with substantial nexus with taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by state.

3. **Commerce § 2* -- taxation -- interstate commerce -- discrimination.**

No state may impose tax which discriminates against interstate commerce by providing direct commercial advantage to local business, since to allow such discrimination would undermine goal of free trade among states which commerce clause was intended to protect.

4. **Commerce § 8* -- taxation -- iron ore dock -- constitutionality.**

Provision of tax statute levying annual occupational tax on all

*See Callaghans Wisconsin Digest, same topic and section number.

persons operating iron ore concentrates dock in wisconsin, but exempting persons engaged in mining metalliferous minerals in Wisconsin discriminates against out-of-state produced iron ore concentrates, constituting type of discrimination of interstate commerce which commerce clause was intended to prevent, and is therefore unconstitutional.

5. **Statutes § 46* -- severability -- invalid provision -- general rule.**

General rule of construction is that invalid statutory provision is severable from valid provision and reviewing court is bound to observe that rule unless observance would produce result inconsistent with manifest intent of legislature.

6. **Statutes § 46* -- severability -- invalid provision -- ascertainment.**

Ascertaining severability of unconstitutional provision from remainder of statute requires determination of legislative intent, which is question of law.

7. **Statutes § 197* -- severability -- invalid provision -- legislative intent.**

* See Callaghan's Wisconsin Digest, same topic and section number.

In determining legislative intent with respect to severability, first resort is to language of statute.

8. Statutes § 211* -- severability -- invalid provision -- unclear language.

When language of statute is unclear concerning severability of invalid provision, reviewing court may examine scope, history, context, subject matter and object of statute in order to discern intent of legislature.

9. Statutes § 46 -- severability -- invalid provision -- factors.

Factors to consider in deciding whether statute should be severed from invalid provision are intent of legislature and viability of severed portion standing alone.

10. Statutes § 46* -- severability -- invalid provision -- effect.

Invalid provision of statute may not be severed when it appears from act that legislature intended statute to be effective only as entity and would not have enacted valid part by itself.

* See Callaghan's Wisconsin Digest, same topic and section number.

11. Commerce § 8*; Statutes § 64* -- iron ore concentrates dock tax -- exemption -- severability -- effect on valid provision.

Effect of severing exemption for Wisconsin-mined metallic minerals from iron ore concentrates dock tax would be contrary to manifest intent of legislature, since by including provision exempting certain concentrates taxed under other statutes from taxation legislature manifested its intent that Wisconsin taconite should be exempt from calculation of ore concentrate-handling tax and to sever the statute from exemption would produce results inconsistent with express legislative intent.

- 12 Statutes § 64* -- taxation -- severability -- imposition of tax-intent of legislature.

When legislature has expressed its intent not to impose tax, reviewing court must be very reluctant to effect tax where none previously existed by severing unconstitutional provision, as it is power of legislature to tax, not prerogative of judiciary.

- 13 Judgments § 113* -- summary judgment -- iron ore concentrates dock tax -- exemptions.

* See Callaghan's Wisconsin Digest, same topic and section number.

In action by dock owner against municipality challenging constitutionality of tax provision, trial court erred in granting defendant's summary judgment motion and denying plaintiffs' summary judgment motion, where tax exemption for state-mined iron ore was discrimination against interstate commerce, was therefore constitutionally invalid, and was unseverable from rest of tax scheme.

HEFFERNAN, C.J., dissents.

APPEAL from an order of the Circuit Court for Douglas County, Douglas S. Moodie, Reserve Circuit Judge. Reversed and remanded.

For the plaintiffs-appellants there were briefs by Robert A. Schnur and Michael, Best & Friedrich, Milwaukee, and oral argument by Mr. Schnur.

For the defendant-respondent the cause was argued by Edward S. Marion, assistant attorney general, with whom on the brief was Bronson C. La Follette, attorney general.

LOUIS J. CECI, J. We review an order of the circuit court for Douglas county dated October 16, 1984, Douglas S. Moodie, reserve circuit judge, in which the circuit court granted the motion for summary judgment of the defendant and denied the plaintiff's motion for summary judgment. Plaintiffs appealed to the court of appeals; we accepted jurisdiction by granting the court of appeals' certification request, pursuant to sec. (Rule) 809.61, Stats.

The issue we consider is whether a tax exemption found in sec. 70.40, Stats., entitled "Occupational tax on iron ore concentrates," violates the Commerce Clause of the United States Constitution and, if so, whether the remainder of the tax scheme is severable from the invalid provision. We conclude

that the provision offends the requirements of the Commerce Clause and that it is not severable. We therefore reverse the decision of the circuit court and remand the matter for entry of an order consistent with this opinion.

Section 70.40(1) provides that "every person operating an iron ore concentrates dock in this state" shall pay "an annual occupational tax equal to 5 cents per ton upon all iron ore concentrates handled by or over the dock during the preceding year" ¹ The

¹The entire tax scheme of sec. 70.40, Stats., 1983-84, provides:

"70.40 Occupational tax on iron ore concentrates. (1) Except as provided in sub. (6), every person operating an iron ore concentrates dock in this state, shall on or before December 15 of each year pay an annual occupational tax equal to 5 cents per ton upon all iron ore concentrates handled by or over the dock during the

(Footnote Continued)

statute became effective on June 30,

preceding year ending April 30 except that as of December 15, 1979, such tax shall apply to the year ending on the preceding December 31. Iron ore concentrates taxed under ss. 70.37 to 70.395 are exempt from taxation under this section. In this section 'dock' means a wharf or platform for the loading or unloading of materials to or from ships.

"(2) Every person on whom a tax is imposed by sub. (1) shall, on May 1 or each year, furnish to the assessor of the town, city or village in which the dock is situated, a full and true list or statement of all iron ore concentrates received or handled by the person during the year ending on April 30 of each year. Beginning in 1979, the list shall be furnished on February 1 and apply to the year ending on the preceding December 31. Any such person who wilfully fails or refuses to furnish the list or statement or who knowingly makes or furnishes a false or incorrect list or statement, shall be fined not exceeding \$1,000.

"(3) The tax provided for in this section shall be
(Footnote Continued)

1977, and was made retroactive to May 1,

separately assessed to the person chargeable therewith by the assessor and shall be included in the assessment roll annually submitted by the assessor to the town, village or city clerk and shall be entered by the clerk on the tax roll. The tax shall be paid and collected as taxes on personal property are paid and collected in the town, city or village where the dock is situated, and shall be deductible from gross income for income tax purposes as personal property taxes are deductible under s. 71.04(3). Taxes collected under this section shall be divided as follows: 10% to the state general fund, 20% to the investment and local impact fund created under s. 70.395(2) and 70% to the town, city or village in which the taxes are collected, which shall be remitted and accounted for in the same manner as the state and county taxes collected from property are remitted and paid.

"(4) If the assessor or board of review has reason to believe that the list or statement made by any person is incorrect, or when any such person fails or refuses to furnish a list or statement as

(Footnote Continued)

1977. 1977 Wis. Laws 29, sec.

required by law, the assessor or board of review shall place on the assessment roll such assessment against the person as they deem true and just. If such change or assessment is made by the assessor, the assessor shall give written notice of the amount of the assessment at least 6 days before the first or some adjourned meeting of the board of review, notice shall be given in time to allow the person to appear and be heard before the board of review in relation to the assessment. Notice may be served as a circuit court summons is served or by registered mail.

"(5) All laws not in conflict with this section relating to the assessment, collection and payment of personal property taxes and the correction of errors in assessment and tax rolls, shall apply to the tax imposed in this section.

"(6) This section does not apply to a municipally owned or operated dock or a dock used solely in connection with an industry and handling no iron ore concentrates except that utilized by the industry."

1655(38)(c). Section 70.40(1) also includes the following exemption, which is at issue in this case: "Iron ore concentrates taxed under ss. 70.37 to 70.395 are exempt from taxation under this section." Section 70.375, Stats., provides for a net proceeds occupation tax on persons engaged in mining metalliferous minerals in this state.²

²Sections 70.375(2) and (2m), Stats., read as follows:

**"70.375 Net proceeds occupation tax on mining of metallic minerals; computation.
 . . .**

"(2) TAX IMPOSED. (a) In respect to mines not in operation on November 28, 1981, there is imposed upon persons engaged in mining metalliferous minerals in this state a net proceeds occupation tax effective on the date on which extraction begins to compensate the state and municipalities for the loss of valuable, irreplaceable metalliferous minerals. The amount of the tax shall be determined by
 (Footnote Continued)

Thus, sec. 70.40(1) effectively exempts

applying the rates established under sub. (5) to the net proceeds of each mine. The net proceeds of each mine for each year are the difference between the gross proceeds and the deductions allowed under sub. (4) for the year.

"(b) The secretary may promulgate any rules necessary to implement the tax under ss. 70.37 to 70.39 and 70.395(1). In respect to mines not in operation on November 28, 1981, s. 71.11(4), (7m), (8), (20) to (22), (42), (44), (46), (47), (49) and (50) applies to the administration of this section.

"(2m) TAX IMPOSED. (a) There is imposed upon persons engaged in mining metalliferous minerals in this state in respect to mines in operation on November 28, 1981, a net proceeds occupation tax effective on the date on which extraction begins to January 1, 1991, to compensate the state and municipalities for the loss of valuable, irreplaceable metalliferous minerals. The amount of the tax shall be determined by applying the rates established under sub. (5) to the average of the net proceeds of the person for the preceding 3-year period. The

(Footnote Continued)

iron ore concentrates mined and taxed in this state under sec. 70.375 from the tax imposed on the operator of an iron ore concentrates dock.

The parties have stipulated to the material facts of this case and disagree only about the application of the law.

Burlington Northern Dock Corporation, a wholly-owned subsidiary of Burlington Northern Railroad Company (collectively, Burlington Northern), is the operator of several iron ore concentrates docks in the City of

net proceeds of a person for each year shall be the difference between the gross proceeds, computed under sub. (3) for the year, and the deductions allowed under sub. (4) for the year.

"(b) In respect to mines in operation on November 28, 1981, s. 71.11(4), (7m), (8) and (20) to (22) applies to the administration of this section to January 1, 1991."

Superior over which it has carried and loaded taconite pellets onto barges for transportation to out-of-state steel mills. Taconite pellets are a condensed form of low-grade iron ore. The term "iron ore concentrates" as used in sec. 70.40, Stats., includes taconite pellets. The taconite passing through the Burlington Northern docks from 1977 through 1980 was mined in Minnesota by various steel producers and manufactured into pellets, carried by Burlington Northern rail to one of three docks operated by Burlington Northern³ in the City of Superior, and finally loaded onto barges operated by the steel companies for its destination to Canadian and lower

³Burlington Northern points out that the newest of its dock facilities was completed in 1977 at a cost of approximately \$68 million. It was financed in part through bonds issued by the City of Superior.

Great Lakes ports and steel mills. Burlington Northern did not carry any taconite pellets for its own use, nor were any taconite pellets transported to its docks for any purpose other than for ultimate transferral onto vessels for delivery outside the State of Wisconsin.

Burlington Northern and the City of Superior agree that Burlington Northern was assessed and paid the following taxes as operator of the iron ore docks, pursuant to sec. 70.40(1):

For the period May 1, 1977, through April 30, 1978: \$322,138;

For the period May 1, 1978 through December 31, 1978: \$439,385;

For the period January 1, 1979, through December 31, 1979: \$655,714; and

For the period January 1, 1980 through December 31, 1980: \$528,622.

This case represents a consolidation of four suits brought by Burlington Northern for refund of taxes and declaratory judgment. Burlington Northern paid taxes under protest to the City of Superior for the four tax periods in question from May 1, 1977, through December 31, 1980. The City of Superior assessed and collected the approximately \$2 million in taxes during that period as provided under sec. 70.40, Stats. Burlington Northern now challenges the constitutionality of that statute.

Burlington Northern bases its suits on three grounds: (1) that sec. 70.40 constitutes an unlawful effort by the State of Wisconsin to tax Burlington Northern with respect to its interstate transportation of taconite pellets, in violation of the Commerce Clause of the United States Constitution; (2) that the

statute violates the import-export clause of the United States Constitution; and (3) that the statute violates the uniformity clause of the Wisconsin Constitution.

After hearing oral arguments on the parties; cross-motions for summary judgment, the circuit court rendered its memorandum decision dated June 12, 1984. The court thereafter entered its findings, conclusions, and final judgment. The circuit court concluded that the exemption with sec. 70.40(1) for Wisconsin-mined taconite results in discrimination against interstate commerce. But it determined that the offending provision was severable from the remainder of the statute and therefore did not affect the validity of the overall tax scheme after severance. The court found no other violations of

the Commerce Clause, import-export clause, or uniformity clause. The circuit court therefore granted defendant's motion for summary judgment and denied plaintiff's motion.

Burlington Northern reasserts all of its grounds for relief which it asserted to the circuit court. The City of Superior argues that, if the exemption violates the Commerce Clause, then the remainder of sec. 70.40 is severable and, therefore, is valid and enforceable.

We find that our analysis of sec. 70.40 in relation to the Commerce Clause is dispositive of this review. We therefore do not consider Burlington Northern's other arguments. Similarly, because we determine that the exemption discriminates against interstate commerce and is not severable from the remainder of the statute, we have no opportunity to

consider the question certified by the court of appeals: "whether there is sufficient nexus between this state and Burlington Northern to justify imposing an occupational tax levied on its dock operations under sec. 70.40, Stats." We thus reach the result of our decision on fairly narrow grounds.

[1]

We define at the outset of our standard for review. A trial court's determination of a tax statute's compatibility with the Commerce Clause is a constitutional question. This court will review constitutional questions independent of the determination of lower courts. See State v. Woods, 117 Wis. 2d 701, 715, 345 N.W.2d 457 (1984).

The Commerce Clause of the United States Constitution provides that, "The Congress shall have power . . . [t]o

regulate commerce . . . among the several states" U.S. Const. art. I, sec. 8. The purpose of the commerce clause is "to create an area of free trade among the several States." McLeod v. J.E. Dilworth Co., 322 U.S. 327, 330 (1944); Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 335 (1977). However, the Commerce Clause has not totally eclipsed the "'power of the States to tax for the support of'" state government or for other purposes. Boston Stock Exchange, 429 U.S. at 328-29 (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 100 (1924)).

A state tax is not per se invalid merely because it may burden the activity of interstate commerce. Maryland v. Louisiana, 451 U.S. 725, 754 (1981). The United States Supreme Court has said that interstate commerce is not dismissed from

paying its "just share of [the] state tax burden even though it increases the cost of doing the business." Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938).

[2]

A state may not indiscriminately tax conduct which constitutes interstate commerce, however. A state tax is generally sustainable against a Commerce Clause challenge "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977); Maryland v. Louisiana, 451 U.S. at 754; see also, Department of Revenue v. Exxon Corp., 90 Wis. 2d 700, 724, 281 N.W.2d 94

(1979), aff'd 447 U.S. 207 (1980);
Midwestern Gas Transmission Co. v.
Revenue Dept., 84 Wis. 2d 261, 270, 267
 N.W.2d 253 (1978).

Burlington Northern argues that the
 doc tax meets none of the Complete Auto
 factors and that the entire tax scheme
 should be held unconstitutional.
 Applying the same factors, the City of
 Superior asserts that the dock tax is
 constitutionally sound. We need not
 consider all of the Complete Auto factors
 because the third criterion -- whether
 the tax discriminates against interstate
 commerce -- ultimately is dispositive of
 our review.

[3]

No state "may 'impose a tax which
 discriminates against interstate commerce
 . . . by providing a direct commercial
 advantage to local business.'" Boston

Stock Exchange, 429 U.S. at 329 (quoting Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959)). To allow such discrimination would undermine the goal of free trade among states which the Commerce Clause was intended to protect. Id.

Our analysis of the tax scheme at issue in this case discloses a discriminatory effect on interstate commerce. There can be little dispute -- indeed, the City of Superior does not dispute -- that the mining and production of taconite pellets in one state and its transshipment into Wisconsin constitutes interstate commerce. Burlington Northern then argues that sec. 70.40 discriminates against Minnesota-produced taconite by effectively favoring Wisconsin-produced iron ore concentrates, including taconite

pellets, which are exempt from taxation under the doc tax.

[4]

We agree with Burlington Northern. The provision exempting Wisconsin metalliferous metals from the dock tax constitutes the type of discrimination to interstate commerce which the Commerce Clause was intended to prevent. This state may not use any portion of its tax code to provide a commercial advantage to local business at the expense of interstate commerce. The only real effect of the exemption in sec. 70.40(1) is to enhance or encourage the Wisconsin metalliferous mining industry at the expense of out-of-state miners. Such a plan "falls short of the substantially even-handed treatment demanded by the Commerce Clause." Boston Stock Exchange, 429 U.S. at 332; see also, Maryland v.

Louisiana, 451 U.S. at 759 ("The common thread running through the cases upholding compensatory taxes is the equality of treatment between local and interstate commerce.").

The City of Superior responds that Burlington Northern is not the victim of discrimination because, as operator of the dock, it enjoys the very exemption it is attacking. For example, if Burlington Northern handles taconite mined and produced in Minnesota, it pays 5 cents per ton in taxes; it pays no tax if it handles Wisconsin taconite.

The City of Superior miscomprehends the discriminatory effects of the tax exemption. We recognize that Burlington Northern may not be discriminated against in the first instance as a result of the exemption. But the discriminatory effect of a state tax need not be on the direct

taxpayer per se. Here, it is out-of-state taconite producers who, as an integral component of interstate commerce, are discriminated against in favor of their Wisconsin counterparts. Evidence in the record indicates, and counsel for Burlington Northern at oral argument stated, that Burlington Northern passes on its tax cost to its taconite-producing customers who use its dock-loading services. Thus, the customers of the services pay higher or lower prices, depending on the origin of the ore. Wisconsin taconite, not affected by the handling tax, is more attractive, again at the expense of its out-of-state counterpart. As we noted above, the Commerce Clause does not approve of such local favoritism.

The City of Superior argues that Burlington Northern receives a benefit

from the exemption for local taconite because Burlington Northern does not pay taxes on Wisconsin-produced taconite. Yet the Supreme Court has recently stated,

"Virtually every discriminatory statute allocates benefits or burdens unequally; each can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relative sense. The determination of constitutionality does not depend upon whether one focuses upon the benefited or the burdened party. A discrimination claim, by its nature, requires a comparison of the two classifications, and it could always be said that

there was no intent to impose a burden on one party, but rather the intent was to confer a benefit on the other." Bacchus Imports, LTD v. Dias, ___ U.S. ___, ___, 82 L.Ed.2d 200, 210 (1984).

Even if we concede for the sake of argument that Burlington Northern is not burdened by the tax exemption, the City of Superior's argument ignores the burden to out-of-state producers, whose taconite is relatively more expensive as a result of the discriminatory exemption.

The City of Superior also argues that local mining companies would not be favored by the tax exemption. Although local mining companies would enjoy the exemption if they shipped across a Wisconsin dock, so would out-of-state

companies if they mined Wisconsin ore. The city concludes that sec. 70.40 in operation confers no "direct commercial advantage to local business." Maryland v. Louisiana, 451 U.S. at 754.

We do not agree with the city's analysis. Favoring in-state mining over out-of-state mining through the tax exemption discriminates against taconite mined out of state. To paraphrase the Supreme Court, it is irrelevant to the Commerce Clause inquiry that the legislature was motivated by the desire to aid in-state mining rather than to hinder out-of-state mining. Bacchus Imports, ___ U.S. at ___, 82 L. Ed. 2d at 210-11. ("[I]t is irrelevant to the Commerce Clause inquiry that the motivation of the legislature was the desire to aid the makers of the locally

produced beverage rather than to harm out-of-state producers.")

Finally, the City of Superior intimates that local taconite producers could not have been unfairly advantaged by the exemption because no Wisconsin producer shipped its taconite via the Burlington Northern docks.⁴ But the discrimination analysis of the Commerce Clause is not dependent upon the vicissitudes of business decisions. Merely because Wisconsin producers of taconite did not ship their product across Burlington Northern's docks does not mean that the tax exemption is not discriminatory. State tax legislation may be discriminatory on the basis of either purpose or effect. Bacchus

⁴The parties stipulated that Burlington Northern operated the only iron ore concentrates docks in this state during the tax periods in question.

Imports, ____ U.S. at ____, 82 L. Ed.2d at 208. The purpose of the exemption in sec. 70.40(1) is to benefit Wisconsin-mined ore, but the exemption does not treat out-of-state ore evenhandedly. The effect of the exemption is to discriminate against out-of-state producers by effectively raising the cost of shipping taconite pellets across the Burlington Northern docks in relation to Wisconsin taconite, which avoids the cost increase.

We next turn to the severability of the unconstitutional exemption from the remainder of the tax statute. Although we agree with the circuit court's conclusion that the tax exemption discriminates against interstate commerce, we hold, contrary to the circuit court's conclusion, that the

exemption is not severable from the remainder of the dock tax.

[5]

The extent of the circuit court's analysis on the severability issue is limited to its citing sec. 990.001(11), Stats. That section provides:

"990.001 Construction of laws; rules for. In construing Wisconsin laws the following rules shall be observed unless construction in accordance with a rule would produce a result inconsistent with the manifest intent of the legislature:

". . .

"(11) SEVERABILITY. The provisions of the statutes are severable. The provisions of any session law are

severable. If any provision of the statutes or of a session law is invalid, or if the application of either to any person or circumstances is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application."

Section 990.001(11) sets forth the general rule of construction that an invalid statutory provision is severable from a valid provision. This court is bound to observe that rule unless observance "would produce a result inconsistent with the manifest intent of the legislature."

[6]

Ascertaining the severability of an unconstitutional provision from the remainder of a statute requires a determination of legislative intent, Madison v. Nickel, 66 Wis. 2d 71, 78, 223 N.W.2d 865 (1974), which is a question of law. This court need not give deference to trial courts' determinations in matters of law. Milwaukee Metropolitan Sewerage District v. DNR, 126 Wis. 2d 63, 71, 375 N.W.2d 649 (1985).

[7, 8]

In determining legislative intent with respect to severability, the first resort is to the language of the statute. See Sacotte v. Ideal-Werk Krug Priester, 121 Wis. 2d 401, 406, 35 N.W.2d 393 (1984). This is particularly true when the statute at issue contains an express severability clause. See generally, 2 Sutherland, Statutory

Construction sec. 44.10 (4th ed. 1973). When the language of the statute is unclear concerning the severability of an invalid provision, this court may examine the "'scope, history, context, subject matter and object of the statute in order to discern the intent of the legislature.'" See Sacotte, 121 Wis. 2d at 406 (citing Green Bay Redevelopment Authority v. Bee Frank, 120 Wis. 2d 402, 409, 355 N.W.2d 240 (1984)).

[9, 10]

The factors to consider in deciding whether a statute should be severed from an invalid provision are the intent of the legislature and the viability of the severed portion standing alone. Chicago & North Western Transportation Co. v. Pedersen, 80 Wis. 2d 566, 575, 259 N.W.2d 316 (1977). Invalid provisions of a statute may not be severed when it

appears from the act that the legislature intended the statute to be effective only as an entirety and would not have enacted the valid part by itself. Madison v. Nickel, 66 Wis. 2d at 79.

[11]

We conclude that the effect of severing the exemption for Wisconsin-mined metallic minerals from the iron ore concentrates dock tax would be contrary to the manifest intent of the legislature. By including the provision "Iron ore concentrates taxed under ss. 70.37 to 70.395 are exempt from taxation" within sec. 70.40(1), the legislature manifested its intent that Wisconsin taconite should be exempt from the calculation of the ore concentrates-handling tax. To sever the statute from the exemption would produce a result inconsistent with express legislative

intent: Wisconsin taconite moving through the Burlington Northern docks or any other state dock handling iron ore concentrates would subject the dock operator and the taconite itself to a nonlegislated tax. The tax would be incurred not as a result of legislative will or decree, but because an invalid exemption existed and was severed. A determination of invalidity of an exemption is not a substitute for a determination that the legislature intended to impose the sec. 70.40 tax on Wisconsin taconite. As it stands, the language of the invalid provision expresses the legislative intent that state taconite not be taxed under sec. 70.40.

[12]

When the legislature has expressed its intent not to impose a tax, this

court must be very reluctant to effect a tax where none previously existed by severing an unconstitutional provision. It is the power of the legislature to tax, not the prerogative of the judiciary. See Wis. Const. art. VIII, secs. 1, 5. Merely because the exemption was deemed invalid does not allow us to reach the conclusion that the legislature intended that Wisconsin taconite be taxed.

Further, an analysis of secs. 70.37-70.395 and sec. 70.40 in tandem suggests that the legislature intended to avoid a double taxation of Wisconsin-mined taconite. That intent would be defeated if the unconstitutional exemption were severed.

Chapter 31 of the Laws of 1977 created secs. 70.37-70.395 and repealed prior mining tax statutes. 1977 Wis.

Laws 31, secs. 10 and 11. The new mining tax scheme placed a net proceeds occupation tax on persons extracting metalliferous metals. It became effective on July 7, 1977. The unconstitutional exemption at issue in this case took its present form in ch. 418 of the Laws of 1977. The exemption became effective on May 19, 1978, approximately one year after sec. 70.40 took effect and ten and one-half months after secs. 70.37-70.395 became effective.

The precursor to the exemption at issue in this case read, "Iron ore concentrates taxed under s. 70.91 are exempt from taxation under this section." See, 1977 Wis. Laws 29, sec. 750g. Section 70.91, Wis. Stats. 1977 (repealed by 1977 Wis. Laws ch. 31, sec. 11), the old mining tax plan, was roughly

analogous to sec. 70.375(2), Stats. It imposed a property tax computed on the amount of low-grade iron ore mined in Wisconsin.

The history of tax legislation on mining and mining-related activities strongly suggests that the legislature intended to avoid a double tax within sec. 70.40 on ore concentrates already taxed under either sec. 70.91, Wis. Stats. 1977, or sec. 70.375, Stats. To now effect a double tax--by severing the exemption from the remainder of the statute--when the legislature intended only a single tax would be contrary to legislative intent.

The City of Superior suggests that the legislature could not have intended that sec. 70.40 be applicable only in its entirety. It points to the fact that the present exemption within sec. 70.40(1),

Stats., was in fact enacted approximately one year after the effective date of sec. 70.40.⁵

As we noted above, however, the original version of sec.70.40 included an exemption analogous to the present exemption. The old provision exempted iron ore concentrates taxed under sec. 70.91 from the tax under sec. 70.40. It is insignificant that the present exemption was enacted one year after the passage of sec. 70.40; the new exemption

⁵As we noted above, sec.70.40 became effective on June 30, 1977, but had retroactive effect on May 1, 1977. The present form of the exemption became effective on May 19, 1978.

If the City of Superior's premise is correct, then the city raises a valid argument that the unconstitutional provision is severable from the remainder of sec.70.40: since the legislature initially enacted sec. 70.40 without the exemption, the legislature arguably intended that sec. 70.40 be operative without the exemption if it is later deemed invalid.

merely reflects the changes made in the overall taxing scheme for mining. The present exemption is not a legislative afterthought added to sec. 70.40. Rather, it is an updated version of the original exemption enacted within sec. 70.40. See, 1977 Wis. Laws 29, sec. 750g. The updating of the exemption does not indicate that the legislature might have considered the exemption severable from the rest of sec. 70.40. On the contrary, the legislative history of the exemption suggests that, from its inception, the exemption was an integral part of the overall scheme of taxing operators of iron ore concentrates docks and was intended to avoid a double tax on iron ore concentrates.⁶

⁶The assistant attorney general, who represented the City of Superior on brief and at oral argument of this case, noted that the legislature recently amended (Footnote Continued)

We conclude that the legislature intended to have sec.70.40, Stats., be effective only in its entirety. To sever sec. 70.40 from the unconstitutional exemption would have the unlegislated effect of taxing dock operators for handling Wisconsin-mined ore concentrates. This court will be loath to effect a tax in situations where the legislature has indicated that no tax be levied.

[13]

sec. 70.40(1) to exclude the exemption for Wisconsin-mined ore. See, 1985 Wis. Laws 29, sec. 1216b. Based on this information, the assistant attorney general asks this court to infer that the legislature intended that sec. 70.40(1) be severable from the unconstitutional exemption. Our analysis of legislative intent, however, is limited to the inception of the statute through the 1980 tax year. Conduct of the legislature almost five years after the last tax year in question in this case will not serve to enlighten our analysis of legislative intent during the time period in question.

Because sec. 70.40 is not severable from the unconstitutional provision, sec.70.40 must be considered invalid in its entirety. The trial court erroneously granted the defendant's summary judgment motion and denied plaintiffs' similar motion. We therefore reverse the decision of the circuit court and remand for vacation of the judgment in favor of the defendant. We instruct the circuit court to enter its judgment in favor of the plaintiffs.

Again, we decide this case on the narrow grounds of discrimination to interstate commerce. We therefore have no opportunity to consider Burlington Northern's other substantive arguments for invalidating the statute. Because we have held that sec.70.40 is not severable from the unconstitutional exemption and, therefore, is invalid, we do not consider

Burlington Northern's argument that sec. 70.40(6), Stats., discriminated against interstate commerce during the relevant time period.⁷

By the Court.--The decision of the circuit court is reversed. The cause is remanded with instructions.

HEFFERNAN, CHIEF JUSTICE
(dissenting). The majority opinion first finds that the exemption within sec. 70.40(1), Stats., for Wisconsin-mined taconite results in discrimination against interstate commerce and then holds that the exemption is not severable

⁷Section 70.40(6), Stats., provided:

"This section does not apply to a municipally owned or operated dock or a dock used solely in connection with an industry and handling no iron ore concentrates except that utilized by the industry."

Section 70.40(6) has been repealed by 1985 Wis. Laws 29, sec. 1216d.

from the remainder of the dock tax, thus invalidating sec. 70.40 in its entirety. The majority claims that:

"By including the provision 'Iron ore concentrates taxed under secs.70.37 to 70.395 are exempt from taxation' within sec. 70.40(1), the legislature manifested its intent that Wisconsin taconite should be exempt from the calculation of the ore concentrates-handling tax. . . .

"Further, an analysis of secs. 70.37-70.395 and sec.70.40 in tandem suggests that the legislature intended to avoid a double taxation of Wisconsin-mined taconite. That

intent would be defeated if the unconstitutional exemption were severed." At page 13, 14.

The majority has incorrectly applied the severability statute, sec. 990.001(11), Stats., in reaching its conclusion. Accordingly, I dissent.

Sec. 990.001(11), Stats., provides, in part, that:

"If any provision of the statutes or of a session law is invalid, or if the application of either to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application."

There is nothing within the meaning of sec. 990.001(11), Stats, which requires the trial court to determine whether the severing of a provision within one statute would invalidate or affect another statute. This court has said in Chicago & Northwestern Transportation Co. v. Pedersen, 80 Wis. 2d 566, 575, 259 N.W.2d 316 (1977), that:

"The intent of the legislature and the viability of the severed portion of the statute whe standing alone are the factors to consider when deciding whether a statute should be severed. Material provisions of a statute may be eliminated.

"'. . . if the part upheld constitutes, independently of the invalid portion, a complete law in some reasonable aspect, unless it appears from the act itself that the legislature intended it to be effective only as an entirety and would not have enacted the valid part alone.'" (Citations omitted.)

Section 70.40, Stats., can easily stand alone without the exemption provisions. I would hold the exemption to be invalid but severable. I would then apply the four-pronged test of Complete Auto Transit, Inc., v. Brady, Chairman, Mississippi Tax Comm., 430 U.S. 274, 279 (1977), to the remainder of the statute to sustain this tax against Commerce Clause challenge.

The court of appeals certified this case on the question whether sufficient nexus exists between Burlington Northern and the City of Superior/State of Wisconsin. Burlington Northern built a new dock at a cost of \$70,000,000 to handle taconite pellets, part of which was financed through the issuance of industrial revenue bonds by the City of Superior. About 125 persons were employed at the facility and about 40,000 tons of taconite were handled during the taxable period. These activities unquestionably formed a sufficient nexus between Burlington Northern and the taxing state, as required by Complete Auto.

In footnote 6, at page 15, the majority notes that the legislature has recently amended sec. 70.40(1), Stats., to exclude the exemption for Wisconsin-

mined ore. The majority's unwillingness to address the validity of sec. 70.40 under the Complete Auto test leaves the parties in the same position at the end of this lawsuit as at the beginning of it, not knowing whether sec. 70.40 would be sustained under a Commerce Clause challenge. As stated above, I believe it should be sustained and, therefore, I respectfully dissent.

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Supreme Court, U.S.
FILED

NOV 13 1986

JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

BRONSON C. LA FOLLETTE,
Attorney General of Wisconsin,

Petitioner,

v.

BURLINGTON NORTHERN RAILROAD
COMPANY and BURLINGTON NORTHERN,
INC., BURLINGTON NORTHERN DOCK
CORPORATION,

Respondents.

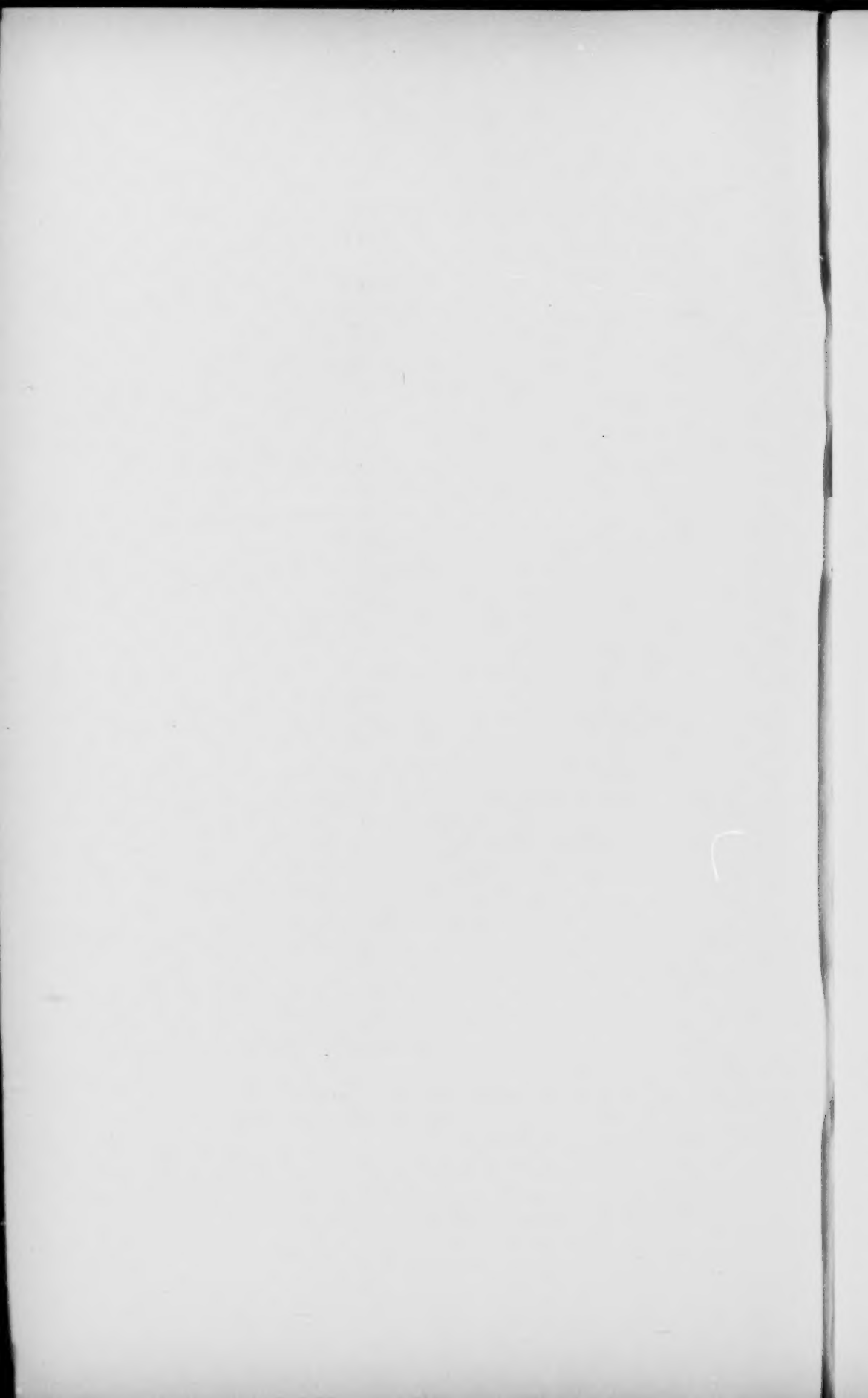
SEPARATE APPENDIX TO PETITION
FOR A WRIT OF CERTIORARI TO
THE WISCONSIN SUPREME COURT
(VOLUME II)

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5412P



STATE OF WISCONSIN
IN SUPREME COURT

Nos. 84-2358 and 84-2359

BURLINGTON NORTHERN, INC., and
BURLINGTON NORTHERN DOCK CORPORATION,

Plaintiffs-Appellants,

v.

THE CITY OF SUPERIOR, WISCONSIN,

Defendant-Respondent.

Nos. 84-2360 and 84-2361

BURLINGTON NORTHERN RAILROAD
COMPANY AND BURLINGTON NORTHERN
DOCK CORPORATION,

Plaintiffs-Appellants,

v.

THE CITY OF SUPERIOR, WISCONSIN,

Defendant-Respondent.

MOTION FOR RECONSIDERATION

Pursuant to secs. (rules) 809.14 and
809.64, Stats., the Attorney General

moves for reconsideration of the court's June 25, 1986, decision, invalidating sec. 70.40, Stats. (1983-84) as violative of the Commerce Clause of the United States Constitution. The grounds for this motion are:

1. The court overlooked and misconstrued significant and controlling facts appearing in the record in deciding that the statute was discriminatory in effect; and

2. The court overlooked controlling legal precedent in deciding that the statute was unconstitutional, irrespective of its effect, merely because its purpose was arguably discriminatory.

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Office of the Clerk

SUPREME COURT

STATE OF WISCONSIN

August 15, 1986

To

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Hon. Douglas S. Moodie
Reserve Judge
Douglas County Courthouse
Superior, WI. 54880

The Court today announced an order in
your case as follows:

#84-2358, #84-2359, #84-2360 and #84-2361
Burlington Northern, Inc., et al v. The
City of Superior/Burlington Northern
Railroad Co., et al v. The City of
Superior

Motion for reconsideration is
denied, with costs.

Abrahamson, Shirley S., J. did not
participate.

MARILYN L. GRAVES

Clerk of Supreme Court

Office of the Clerk

SUPREME COURT

State of Wisconsin

Hon. Douglas S. Moodie

2328 Ogden Ave.

Superior, WI 54880

January 14, 1986

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*

The Court today announced an order in your case as follows:

Nos. 84-2358, Burlington Northern, Inc.,
 84-2359 Burlington Northern Dock
 84-2360 & Corporation v. City of
 84-2361 Superior

The court having considered the court of appeals' request pursuant to sec. (rule) 809.61, Stats., that this court accept the certification of this appeal;

IT IS ORDERED, the certification request is granted and jurisdiction of the appeal is accepted; and

IT IS FURTHER ORDERED, the briefs previously submitted to the court of appeals may stand as the briefs in this court. Ten additional copies of each brief must be submitted within 10 days of the date of this order. Notification of the date and time for oral argument in this appeal will be made in the usual manner.

*Merrill Hoven
Clerk of Courts
Douglas County Courthouse
Superior, WI 54880

MARILYN L. GRAVES

Clerk of Supreme Court

Nos. 84-2358
84-2359
84-2360
84-2361

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT III

BURLINGTON NORTHERN, INC.,
and BURLINGTON NORTHERN
DOCK CORPORATION,

Plaintiffs-Appellants,

v.

THE CITY OF SUPERIOR,
WISCONSIN,

Defendant-Respondent.

CERTIFICATION BY
COURT OF APPEALS OF WISCONSIN

Before Cane, P.J., Dean and
LaRocque, JJ.

We certify this appeal to the
Wisconsin Supreme Court to determine
whether there is sufficient nexus between
this state and Burlington Northern to
justify imposing an occupational tax

levied on its dock operations under sec. 70.40, Stats. Burlington Northern challenges the constitutionality of the tax as a violation of the commerce clause. The trial court found a substantial nexus on the basis of Burlington Northern's statewide activities and the revenues generated by the dock operations. While there are several issues raised in this appeal, we conclude that the issue of whether there is a substantial nexus between Burlington Northern and Wisconsin is dispositive.

Burlington Northern seeks a refund of taxes paid under sec. 70.40, an occupational tax levied on its dock operations as measured by the volume of taconite handled by the docks annually. The taconite originates in Minnesota and is consumed outside of Wisconsin. It is shipped by rail from Minnesota to

Superior where it is loaded onto ships at Burlington Northern's docks.

Before a state may directly or indirectly tax interstate commerce, the activity taxed must have a substantial nexus with the state. Complete Auto Transit Inc. v. Brady, 430 U.S. 274, 277, reh'g denied, 430 U.S. 976 (1977). In Midwestern Gas Transmission Co. v. Department of Revenue, 84 Wis. 2d 261, 265-71, 267 N.W.2d 253, 255-58 (1978), the court discussed the "substantial nexus" requirement, concluding that the tax was impermissible where the item taxed is an "integral part of the process of interstate commerce which does not have a substantial nexus within the state." Midwestern Gas involved a tax on fuel consumed by a pipeline to propel the gas through the pipeline. The opinion relied substantially on Helson and

Randolph v. Kentucky, 279 U.S. 245 (1929). In Commonwealth Edison v. Montana, 453 U.S. 609, 615 (1981), the Supreme Court noted that Helson has been undermined by more recent cases. Because the United States Supreme Court has weakened or destroyed the authority relied upon by the Wisconsin Supreme Court in Midwestern Gas, the validity of the holding of Midwestern Gas is questionable. This court lacks the authority to disregard that holding.

We conclude that it is appropriate for the supreme court to determine whether the holding of Midwestern Gas should be applied to this case to require a refund for taxes paid. Burlington Northern contends that its docks are an integral part of the interstate movement of taconite, similar to the gas that fueled the pipeline pumps in Midwestern

Gas. The state argues that the \$70,000,000 dock facility and the process of handling 40,000,000 tons of taconite constitute a distinct instate presence sufficient to justify taxation. It is appropriate for the supreme court to determine whether recent developments in the United States Supreme Court's interpretation of the commerce clause require or justify a change in the analysis set out in Midwestern Gas.

STATE OF WISCONSIN CIRCUIT COURT
DOUGLAS COUNTY

BURLINGTON NORTHERN RAILROAD
COMPANY, BURLINGTON NORTHERN
DOCK CORPORATION,

Plaintiffs,

v.

Case No. 79-CV-293

Case No. 80-CV-394

Case No. 81-CV-426

Case No. 82-CV-189

THE CITY OF SUPERIOR, WISCONSIN,

DEFENDANT.

MEMORANDUM OPINION

These are cases in which the plaintiff seeks a declaratory judgment that taxes which it has paid to the defendant are unconstitutional and for refund of such taxes. The taxes in question were assessed and collected by the defendant each year beginning on May 1, 1977, through and including 1980 and thus separate suits for each year were brought though all are consolidated

for decision. The matter is now before the Court on motion for summary judgment based upon stipulated facts which will be referred to by paragraph and page. Exhibits attached to the stipulated facts are referred to by number. The tax, alleged to be unconstitutional, is imposed by Wis. Stats. 70.40:

"Occupational tax on iron ore concentrates. (1) Except as provided in Sub. (6), every person operating an iron ore concentrates dock in this state, shall on or before December 15, of each year pay an annual occupational tax equal to 5 cents per ton upon all iron ore concentrates handled by or over the dock during the preceding year ending April 30, except that as of December 15, 1979, such tax shall apply to the year ending on the preceding December 31. Iron ore concentrates taxes under Ss. 70.37 to 70.395 are exempt from taxation under this section . . ."

(6) This section does not apply to a municipally owned or operated dock or a dock used solely in connection with an industry and handling no iron

ore concentrates except that utilized by the industry."

I.

F A C T S

The Plaintiff, Burlington Northern (here-in-after, Burlington) is an interstate railroad carrier operating in 16 states. The Plaintiff, Burlington Northern Dock Corporation, is a wholly owned subsidiary of the Burlington. It was formed for the purpose of financing the construction of a "new" dock to more efficiently handle taconite pellets than the "old" docks owned in Superior by Burlington. The new dock is owned by J. P. Morgan Interfunding Corporation and General Electric Credit Corporation and leased to the Dock Corporation which in turn entered into an operation agreement with Burlington to operate it. The dock was constructed in 1977 at a cost of

\$68,356,037. Shortly after it was completed S. 70.40 was enacted.

Taconite, which is made from "left-overs" from iron ore mining after extensive processing and pelletizing, is produced primarily in the State of Minnesota. The taconite relevant to this case is produced in plants operated and managed by the Steel Companies who take their share of the production proportionately based on their ownership interests. These companies also had agreements with plaintiff requiring them to ship minimal annual tonages and to pay guaranteed minimum fees. (See stipulated facts: Paragraph 66, p. 42 & Ex. 23, 24, 25 & 26.) Details of ownership and agreements are given in the stipulated facts and exhibits.

The plaintiff transported the taconite pellets in several daily trains

from the various producers in Minnesota to Superior, Wisconsin and the old and new docks. (See diagram, Ex. 16.) When possible, the pellets are unloaded into automated unloading machines and immediately dumped and conveyed to one of the docks for pocket docks or silos and may be immediately loaded into a waiting vessel. At times no vessel might be available and the pellets would be held for the next available ship. If no vessels are available for some time or the dock storage bins were full and in winter when the shipping season was closed, the pellets would be kept in holding piles.

None of the taconite handled on the docks was intended for use in Wisconsin. The taconite was intended for lower lake ports and some Canadian ports. (See Ex. 34 for a chart of the

vessels, courses to the lower lake ports.)

Both old and new docks are located, of course, in the City of Superior. In each year, plaintiff paid under protest taxes imposed under 70.40 the following: 1978, \$322,138.85; 1979, \$439,385.55; 1980, \$655,714.30; 1981, \$528,622.05.

Details of the process of mining the crude ore and of the making of the taconite pellets are contained in the stipulation. (See paragraphs 28-31, pps. 15-18 inclusive: Details of production and loading of taconite, paragraphs 32-27, pps. 15-21; Details of distances and travel time are shown in paragraphs 43-51, pps. 26-30; Details of the amount of pellets produced and the distances shipped are shown on Paragraphs 43-46, pps. 26-27; Ex. 18 shows source of

deliveries and percentage consigned to storage.)

During the years in question, Burlington was and is now exempt from Wisconsin corporate franchise and income taxes. Other Wisconsin taxes which it does pay are set forth in Paragraphs 45-88, pps. 52-54 and see Ex. 36. The Dock Corporation pays no Wisconsin taxes. Wisconsin does not nor does any of its municipalities assess a property or add valorem tax on the pellets at any time. Consideration of the pellet movement in calculating Burlington's system-wide market value allocable to Wisconsin is described in Paragraph 92, p. 56.

During the relevant period, the taconite was not made the measure of an occupation tax on its handling at a facility in any other state though the pellets were subject to payment of

personal property taxes in West Virginia, Indiana, and Ohio which were paid by the owners of the taconite pellets.

Taconite pellets were produced from crude ore mined in Wisconsin by the Jackson County Iron Company. Such pellets were the only taconite pellets produced in Wisconsin during the relevant period. These pellets were transported by rail and were not handled over any dock. (Pages 57-58)

There were no operations within the meaning of 70.40(6) by a municipality or industry within the State of Wisconsin.

Burlington Northern's gross Wisconsin revenues ranged from \$70,510,393 in 1977 to \$115,947,965 in 1980. The gross operating revenues with respect to taconite pellets during the period in issue ranged from \$15,000,000

to \$36,000,000. (See Paragraph 102, pps. 59-60.)

Burlington Northern employed about 1,750 persons in Wisconsin. About 850 of these persons (paychecks addressed to Wisconsin residents) lived in the City of Superior and about 125 of such persons were employed in connection with the dock facility.

II.

I S S U E S

The plaintiff argues that the tax imposed by Section 70.40 violates the Commerce Clause of the United States Constitution and specifically fails each of the four requirements for a valid state tax respecting interstate commerce as set forth in Complete Auto Transport v. Brady, 430 U.S. 274, 51 L. Ed. 2d 326 (1977). In addition, plaintiff contends

that Section 70.40, having imposed a tax on pellets exported from Wisconsin to Canadian cities, violates the Import-Export Clause of the United States Constitution. Also, the statutory exemption for Wisconsin produced taconite is alleged to be discriminatory. Finally, the plaintiff argues that Section 70.40 is a property tax substitute subject to uniformity requirements of Art. VIII, Sec. 1, Wisconsin Constitution, since manufacturer's materials, in this case, taconite pellets, are exempt. Plaintiff argues that therefore they are not uniformly treated.

Defendant City reminds the Court that the burden of proof of one asserting the unconstitutionality of a statute is a "heavy" one and is on the plaintiff and that there is a presumption of constitutionality. Both Defendant City and the

Attorney General deny any obstruction of the Commerce Clause and assert complete satisfaction of all four prongs of the Complete Auto test. The joint argument is made that plaintiff confuses the nature of the tax with the measure of the tax--that here we have an occupation tax on the privilege of operating a dock facility measured by the tonnage that is handled by the facility locally. For this reason, they see no violation of the Export-Import Clause nor of the uniformity clause of the Wisconsin Constitution. In addition, defendant argues as to claimed discrimination, it is actual discrimination that must be shown in the practical operation of the statute. Thus, says the defendants, plaintiff has shown no Wisconsin producers who have used the dock facility and gained the exemption, but even if

they had, plaintiff's liabilities would have been unaffected or conversely would have been greater but for the exemption.

III.

DECISION

I uphold the constitutionality of Section 70.40 and dismiss plaintiff's complaint for the reasons that follow:

Before proceeding directly to the difficult questions involved in deciding constitutionality of Section 70.40, I feel I must, at the outset, determine the nature of the tax since that determination affects several aspects of the decision. Plaintiff contends the tax is a "property tax substitute" or is "in practical effect, a property tax." The emphasis throughout plaintiff's argument, then, is on the economic effect and burden of the tax on the taconite

pellets. Defendant counters that plaintiff confuses subject of the tax with its measure and that the only subject of this tax is the business or operating a dock for loading and unloading iron ore concentrates.

I believe the position of the defendant is the correct one, mandated by the decisions of the legislature and the Wisconsin Supreme Court. It is of some significance to note that Wisconsin has had, long previous to the passage of Section 70.40, a pattern of occupational taxes on dock and transshipment facilities: 70.42, occupational tax of 1 1/2 cents a ton handled on coal docks; 70.41, occupational tax on grain elevators of 1/2 mill per hundred; 70.415, occupational tax on scrap iron

dock of 3 1/2 cents per ton handled. See Thrig, "Occupational Taxes," 17 Marq. L. Rev. 19 (1932).

An industry exemption similar to that in 70.40 was granted in the coal dock tax and that type of tax was viewed by the Court as an effort by the legislature "to subject the industry to a more reasonable proportion of the tax burden." State ex rel Carneigie Doc v. Beckley, 186 Wis. 80 (1925). The Court, facing the argument that the occupational tax on grain (70.41) was a property tax held that it was not. The Court explained that it was the clear right of the legislature to designate the nature of its taxes and that it had been clearly established here that the tax was an occupational tax. State ex rel Bernhard Stern & Sons v. Bodden, 165 Wis. 75 (1917). The term "in lieu of property

tax," the Court viewed as of no legal significance but simply a judgment of the legislature. I understand, of course, that the legislature can not designate one form of tax but impose another without being subject to judicial review. State ex rel Froedert Grain & Malting Co. Inc. v. State Tax Commission, 221 Wis. 225 (1936). I do not see that case as requiring a determination by the Court of tax differing in nature from that designated by the legislature in view of the clear pattern of occupational taxes established by the legislature over the years and without other persuasive reasons.

In addition, it may have been noted by the legislature in this Great Lakes State that the dock area in our Wisconsin port cities is indeed a limited state resource. The state legislature has a

right to consider and to have an interest in that limited resource; to see that such a resource is protected and bears its fair proportion of taxes somewhat in the same manner as a state protects and taxes its exhaustible state natural resources.

I can not find that plaintiff's authority that the designation of the nature of a tax by the legislature is not necessarily controlling and compels the step further that plaintiff requests: i.e. that the legislative designation must be disregarded. Here there is a clear legislative determination with a pattern of legislative history. I find that the tax is an occupational tax.

The questions presented by constitutional challenge to a statute involving inter-state commerce application are difficult of resolution. At least one

commentator has said that the United States Supreme Court "has produced a 'quagmire' of inconsistently reasoned decisions." State Taxation of Interstate Business, 29 U of Florida Law Rev. 752 (1977). The Supreme Court itself has noted the difficulties of reconciling the large number of its decisions in the field. See Miller Bros. v. Maryland, 347 U.S. 340, 344 (1954); Freeman v. Hewit, 329 U.S. 249, 252 (1946). Reviews of the history of the law in this field of varying degrees of depth and quality may be found readily among the many commentators in the field; State Taxation of Interstate Business, 62 Va L Rev. 149; State Taxation on the Privilege of Doing Interstate Business, 1978 Boston College L Rev. 112; Severance Taxes and the Commerce Clause, 1983 Wis. Law Rev. 427.

Briefly (and much over-simplified) those articles trace the Supreme Court's early cases prohibiting any state action in the field based on the premise that the power to tax implies the power to destroy. Thereafter, recognizing the need for some state revenue in the area, the Court developed the "direct-indirect" theory-striking the "direct" tax while upholding the "indirect" tax. Then, in Western Livestock v. Bureau of Revenue, 303 U.S. 250 (1938), the Court indicated inter-state commerce should bear its fair burden so long as it was fairly apportioned within the taxing state. However, in Spector Motor Service v. O'Connor, 340 U.S. 602 (1951), where the tax seemed non-discriminatory and fairly apportioned it was held invalid. But then came Complete Auto., *supra* (1977). This case upholding a Mississippi

privilege tax specifically overruled Spector and established four criteria that must be met before a state tax affecting inter-state commerce can be upheld.

Plaintiff says these four criteria are not met here. I disagree and they will be discussed in order:

(1) Nexus.

All parties agree on the four prongs of Complete Auto tests, the first of which is nexus, or a minimum connection between the taxed activities and the taxing state. Plaintiff relies on our Wisconsin Supreme Court's interpretation of nexus in Midwestern Gas Transmission Co. v. Dept. of Revenue, 84 Wis. 2d 261, (1978).

It seems to me, however, that this case is not persuasive authority that adequate nexus does not exist in the

instant case. In Midwestern Gas, the Department attempted to collect a sales and use tax solely upon gas consumed by engines providing the pressure necessary to propel the great bulk of the taxpayers' gas through the pipeline in inter-state commerce. This activity simply did not have "substantial nexus" with the state.

In the instant case the taxpayer caused the "new" dock facility to be built expressly for its use to handle taconite at a cost in excess of sixty-eight million dollars and is the lessor and apparent sole operator of the facility through its wholly owned subsidiary. Plaintiff employs about 125 persons at the facility and another 1,625 persons in the state. Plaintiff had gross operating revenues during the relevant period from over 70 million

dollars in 1977 to over 115 million in 1980 of which about 15 million in 1977 and 36 million in 1980 were from taconite operations at the dock.

In National Geographic Society v. Cal. Bd. of Equalization, 430 U.S. 551, 51 L Ed 2d 631 (1977), the Supreme Court held there was sufficient nexus where the Society had two offices in the state even though the two offices had nothing to do with the tax activity, which in this case was a "use" tax as distinguished from a direct tax. The Court found sufficient connection under the circumstances. See also Exxon Corp. v. Wis. Dept. of Revenue, 447 U.S. 207, 65 L Ed 66 (1980), Colonial Pipeline v. Traigle, 421, U.S. 100, 44 L Ed 2d 1, (1978). In view of the holdings in these and other cases, it seems to me there is clearly sufficient "nexus" in the instant case.

(2) Fair Apportionment.

The second prong of the Complete Auto criteria requires that the state tax be fairly apportioned to the local activity. Plaintiff relies largely on Michigan-Wisconsin-Pipeline v. Calvert, 347 U.S. 157, 98 L Ed 583 (1954). A review of the facts of that case, however, shows a considerable difference in the situation involved. Plaintiff there was a pipeline company not selling in Texas and it produced no gas of its own. It purchased from a Texas company which collected the gas and transmitted it 300 yards through its own pipes to the boundaries of plaintiff's property where meters were installed. It was the "taking" there that was the subject of the Texas tax. It was an "occupational" tax but exclusive of that tax, plaintiff paid an ad valorem tax on the value of

all its facilities and leases in the state. The United States Supreme Court did not agree with the Texas Court that the "taking" was just as local in nature as the production itself. The Court felt that the gas had already begun its movement in inter-state commerce. The Court also foresaw possibilities of multiple taxation.

It seems to me there is a difference of substance between the constant flow of gas involved in the gas pipeline case and an occupational tax on a substantial facility where the interstate commerce product is, at time speeded through the facility and at other times stockpiled, for varying periods up to several months. The tax in Texas was on the "gathering" but the product was in continuous flow in its journey in interstate commerce. Further, later cases

have indicated that the risk of multiple taxation must be more than asserted--it must be shown: Dept. of Revenue of State of Washington v. Stevedoring Assn. 435 U.S. 734, 55 L Ed 682 (1978); Exxon Corp. v. Wis. Dept. of Revenue, 447 U.S. 207 65 L Ed 66 (1980); and see J.C. Penney Co. Inc. v. Hardesty, 264 S.E. 2d 604 S. W. (1980). I find that this taxation of the right to operate the dock facility does not violate the fair apportionment requirement.

(3) Discrimination.

The third prong of the Complete Auto requirement is that the state tax does not discriminate against inter-state commerce. Plaintiff here points to the statutory exemptions for iron ore concentrates produced and taxed in Wisconsin under the net proceeds tax and also the exemption granted to taconite

handled by a dock used solely in connection with an industry and handling no iron ore concentrates except that utilized by the industry. Here, plaintiff relies primarily on Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 50 L Ed 2d 514 (1977) and Maryland v. Louisiana, 451 U.S. 725, 68 L Ed. 2d 576 (1981).

It is true that the tax is on the privilege of operating the dock facility and the measure is the volume of taconite handled. While the exemption is such that it would mean no tax computed for the added Wisconsin taconite, it is the advantage thus given to Wisconsin producers that is the claimed discrimination. Defendant argues that no such Wisconsin concentrates have ever used the facility. I do not read the cases cited by plaintiff as similar in this respect

to the multiple taxation cases. I believe the exemption does create discrimination within the meaning of the Complete Auto if the exemption were allowed to stand. See also Westinghouse Electric Corp. v. Tully, U.S. Law Week, 4-24-84. However, and particularly where the exemption has never been used, I believe it is severable and may be declared invalid without affecting the validity of the statute as a whole. (Wis. Stats. 990.001(11)). I do not view the exemption for an industry (which might or might not be in inter-state commerce) in the same light and do not see that is in any way discriminatory. I therefore find the exemption as to Wisconsin proposed taconite invalid but severable and not affecting the validity this tax imposed by Section 70.40.

(4) Fairly related to services provided.

With respect to the fourth prong of the Complete Auto test-- that the tax be fairly related to the services provided by the state--both parties cite and rely on Commonwealth Edison Co. v. Montana, 453 U.S. 609, 69 L Ed 884 (1981). Again, however, plaintiff argues that we are considering a tax on the taconite itself and that it must relate to the contacts with the state. (Miles traveled in the state, etc.)

As previously stated, I disagree with plaintiff's position in this regard. We are concerned with an occupational tax on a dock facility, which with the employees and other facilities of plaintiff present a substantial connection with the state. As Commonwealth points out, the fourth prong is closely connected with the first

prong. Here the tax is measured by volume of taconite pellets handled at the facility. It seems to me therefore in "proper proportion" to the taxpayers activities within the state; and therefore the taxpayer is shouldering a fair share of the state provision of police, fire, and state administration and "advantages of a civilized society." Exxon v. Wis. Dept. of Revenue, supra.

It is not, of course, for this Court to make any determination respecting the propriety of the amount of the tax or revenues or costs involved. These are not matters for the Court, but for the legislature.

(5) The tax violates the Import-Export Clause.

In addition to the claim of unconstitutionality based on the commerce

clause, plaintiff asserts that Section 70.40 violates the Import-Export Clause. This clause, of course, prohibits a state without Congress' consent from laying any imposts or duties on imports or exports . . . Plaintiff relies on Richfield Oil v. State Board of Equalization, 329 U.S. 91 L Ed 80 (1949). The California tax there held unconstitutional involves facts substantially different from the instant case. The transaction involved a California seller with the sale of oil to a New Zealand buyer with delivery to harbor storage tanks and from there to a steamer. California collected a retail sales tax measured by gross receipts from the sale. The retailer was specifically authorized by statute to collect the tax from the consumer. The Court held this violated the prohibitions against the tax

on the goods. Here the tax is on the local dock facility measured by the amount of taconite pellets handled. It is difficult to see how this in any sense imposes an impost or duty. The Supreme Court has in a much later case indicated a tax on handling goods would not be deemed a tax on the goods themselves and therefore not a violation of the Import-Export Clause. Washington v. Stevedoring Assn. supra, (1978). We have in the instant case no interference with federal foreign policy and no inter-state rivalry or friction to result. The instant tax is not related to the value of the taconite but rather to volume handled. I believe plaintiff has failed to establish that the tax in question violated the Import-Export Clause.

(6) Plaintiff argues the taconite is not assessed uniformly.

The argument of plaintiff in this respect is based on the uniformity clause of the Wisconsin Constitution, Article VIII, Section. Plaintiff acknowledges that to make this argument, the assumption must be made that we are dealing with a property tax. I, for reasons set forth above, am unwilling to make that assumption and therefore this point requires no further discussion.

For the reasons stated above, with the exception of the exemption granted to Wisconsin ore concentrates under Ss. 70.37 to 70.395 which I find unconstitutional, I find Section 70.40 to be constitutional.

Plaintiff's motion for summary judgment is denied. Defendant's attorney

may draw findings, conclusion, and judgment in accordance with this opinion.

Dated this 12th day of June, 1984,
in Superior, Wisconsin.

BY THE COURT:

Douglas S. Moodie
Reserve Judge

STATE OF WISCONSIN CIRCUIT COURT
DOUGLAS COUNTY

BURLINGTON NORTHERN, INC.,
BURLINGTON NORTHERN DOCK
CORPORATION,

Plaintiffs,

v. Case Nos. 79-CV-293
80-CV-394

THE CITY OF SUPERIOR, WISCONSIN,

Defendant.

BURLINGTON NORTHERN RAILROAD
COMPANY, BURLINGTON NORTHERN
DOCK CORPORATION,

Plaintiffs,

v. Case Nos. 81-CV-426
82-CV-189

THE CITY OF SUPERIOR, WISCONSIN,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant, The City of Superior,
Wisconsin, having moved, based upon
stipulated facts, for Summary Judgment,

the Court having heard the oral arguments made, considered the Briefs filed, and rendered its Memorandum Opinion (which is incorporated herein by reference), the Court hereby finds and decides as follows:

Findings of Fact

1. Each fact stated and contained in the Stipulation of Facts (and in the Exhibits attached thereto) by and between plaintiffs and defendant, dated July 28, 1983, and filed with the Court by defendant in support of its Motion for Summary Judgment be, and they hereby are, incorporated herein by reference as though set forth herein in their entirety.

Conclusions of Law

1. Plaintiffs have failed to carry their burden of proof and have failed to demonstrate that Section 70.40, Wis. Stats., is unconstitutional.

2. Subject to the conclusion contained in Paragraph 7 hereof, Section 70.40, Wis. Stats., does not violate the commerce clause of the United States Constitution.

3. The subject of the tax imposed by Section 70.40, Wis. Stats., is the business of operating in the State of Wisconsin a warf or platform for the loading or unloading of iron ore concentrates to or from ships. The amount of iron ore concentrates handled constitutes the measure of the tax, not its subject.

4. The tax imposed by Section 70.40, Wis. Stats., constitutes an occupational, and not a property, tax.

5. Plaintiffs and plaintiffs' activities which render it subject to the tax imposed by Section 70.40, Wis. Stats., have a sufficient nexus with the State of Wisconsin and the City of Superior, Wisconsin to support the imposition of the Section 70.40, Wis. Stats., tax upon plaintiffs.

6. The tax imposed by Section 70.40, Wis. Stats., is fairly apportioned.

7. The exemption from the measure of the tax contained in Section 70.40(1), Wis. Stats., for iron ore concentrates taxed under ss. 70.37 to 70.395, discriminates against interstate commerce; but is severable and does not affect the validity of the tax imposed

upon plaintiffs by Section 70.40, Wis. Stats.

8. The tax imposed by Section 70.40, Wis. Stats., is fairly and reasonably related to the services provided to the plaintiffs by the City of Superior and the State of Wisconsin.

9. The tax imposed by Section 70.40, Wis. Stats., is not an impost or duty, and does not violate the import-export clause to the United States Constitution.

10. Section 70.40, Wis. Stats., does not violate the uniformity requirement contained in Article VIII, Section 1, of the Wisconsin Constitution.

Signed this _____ day of September,
1984.

BY THE COURT:

Douglas S. Moodie
Reserve Judge

Approved as to Form:

Robert A. Schnur
Attorney for Plaintiffs

STATE OF WISCONSIN CIRCUIT COURT
DOUGLAS COUNTY

BURLINGTON NORTHERN, INC.,
BURLINGTON NORTHERN DOCK
CORPORATION,

Plaintiffs,

v. Case Nos. 79-CV-293
80-CV-394

THE CITY OF SUPERIOR, WISCONSIN,

Defendant.

BURLINGTON NORTHERN RAILROAD
COMPANY, BURLINGTON NORTHERN
DOCK CORPORATION,

Plaintiffs,

v. Case Nos. 81-CV-426
82-CV-189

THE CITY OF SUPERIOR, WISCONSIN,

Defendant.

FINAL JUDGMENT

Defendant, The City of Superior,
Wisconsin, having moved, based upon
stipulated facts, for Summary Judgment,
the Court having heard the oral arguments

made, considered the Briefs filed, rendered its Memorandum Opinion, and entered Findings of Fact and Conclusions of Law,

IT IS ORDERED, ADJUDGED AND DECREED:

1. That the motion of defendant, The City of Superior, Wisconsin, for summary judgment be, and it hereby is, granted.

2. That plaintiffs' complaints be, and they hereby are, dismissed in their entirety, on their merits and with prejudice.

3. That defendant, The City of Superior, Wisconsin, be, and hereby is, awarded its statutory costs, attorneys' fees and disbursements in the sum of \$414.81.

Signed this _____ day of September,
1984.

BY THE COURT:

Douglas S. Moodie
Reserve Judge

Approved as to Form:

Robert A. Schnur
Attorney for Plaintiffs

SECTION 1216B. 70.40(1) of the statutes is amended to read:

70.40(1) ~~Except as provided in sub-~~
~~(6), every~~ Every person operating an iron
 ore concentrates dock in this state,
 shall on or before December 15 of each
 year pay an annual occupational tax equal
 to 5 cents per ton upon all iron ore
 concentrates handled by or over the dock
 during the ~~preceding~~ year ending April 30
~~except that as of December 15, 1979, such~~
~~tax shall apply to the year ending on the~~
~~preceding December 31.~~ Iron ore
 concentrates taxed under ss. 70.37 to
 70.395 are exempt from taxation under
 this section. In this section "dock"
 means a wharf or platform for the loading
 or unloading of materials to or from
 ships.

SECTION 1216d. 70.40(6) of the statutes is repealed.

DEC 15 1986

JOSEPH F. SPANIOL,
CLERK

In The
Supreme Court of the United States

October Term, 1986

BRONSON C. LA FOLLETTE,
Attorney General of Wisconsin,

Petitioner,

v.

BURLINGTON NORTHERN RAILROAD COMPANY
and BURLINGTON NORTHERN DOCK
CORPORATION,

Respondents.

On Petition for Writ of Certiorari to
the Supreme Court of the State of Wisconsin

BRIEF OF RESPONDENTS IN OPPOSITION

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BURLINGTON NORTHERN RAILROAD
COMPANY AND BURLINGTON
NORTHERN DOCK CORPORATION



QUESTION PRESENTED FOR REVIEW

Does a state tax on iron ore which expressly exempts ore mined within the taxing state (and which therefore discriminates on its face against ore mined in other states) violate the Commerce Clause of the United States Constitution?

PARTIES

The parties to the proceedings below were the Petitioner, Bronson C. La Follette, Attorney General of Wisconsin and the Respondents, Burlington Northern Railroad Company, a Delaware corporation, and Burlington Northern Dock Corporation, a Delaware corporation. The lower court caption also included Burlington Northern, Inc., which is the prior name of the present Burlington Northern Railroad Company, and which is now a newly organized holding company. The new holding company was not a tax payer during the years at issue and is not a party to this case.

In compliance with Supreme Court Rule 28.1, Burlington Northern Railroad company and Burlington Northern Dock Corporation have the relationships described below with respect to other companies held by the Burlington Northern, Inc. holding company.

BURLINGTON NORTHERN, INC.

Subsidiaries and Affiliates

BN Financial Services Inc.

BN Geothermal Inc.

BN Leasing Inc.

Burlington Northern Foundation

Burlington Northern International
Services Inc.

Burlington Northern Trading
Company Inc.

Burlington Northern Motor
Carriers Inc.

BNMC Leasing Inc.

Burlington Northern Overseas

Finance Company N.V.

Burlington Northern Railroad
Company (See Page iv)

Colt Intermodal Inc.

Glacier Park Company

Dreyer Bros., Inc.
Glacier Arizona Company
Glacier Park Boulder Company
Glacier Park Denver Company
Glacier Park Orillia Company I
Glacier Park Riverpoint
Company
Heritage Glacier Park Company
Kalispell Glacier Park Company
Tennessee Glacier Park Company

Glacier Park Liquidating Company

Meridian Minerals Company

Granite Falls Rock
Meridian Aggregates Company
Saxony Corporation

M-R Holdings (See Page v)

National Exchange, Inc. (90%)

National Exchange
Satellite, Inc.

New Mexico and Arizona Land
Company (50%)

NZ Development Corporation
NZ Properties, Inc.

Plum Creek Timber Company, Inc.

Plum Creek Foreign Sales
Corporation

Research Applications Inc.

The El Paso Company (See Page v)

Burlington Northern Railroad Company

The Belt Railway Company of Chicago (8.33%)
 Burlington Northern Dock Corporation
 Burlington Northern (Manitoba) Limited
 Burlington Northern Railroad Properties Inc.
 Camas Prairie Railroad Company (50%)
 Clarkland Royalty, Inc.
 Davenport, Rock Island and North Western
 Railway Company (50%)
 The Denver Union Terminal Railway
 Company (33.33%)
 Houston Belt & Terminal Railway Company (12.5%)
 Iowa Transfer Railway Company (25%)
 Kansas City Terminal Railway Company (16.67%)
 Keokuk Union Depot Company (40%)
 The Lake Superior Terminal and Transfer
 Railway Company (66.67%)
 Longview Switching Company (33.33%)
 The Minnesota Transfer Railway Company (33.33%)
 Paducah & Illinois Railroad Company (33.33%)
 Portland Terminal Railroad Company (40%)
 The Saint Paul Union Depot Company (40.2%)
 Terminal Railroad Association of St. Louis (12.5%)
 Trailer Train Company (9.76%)
 Western Fruit Express Company
 The Wichita Union Terminal Railway
 Company (33.33%)
 Winona Bridge Railway Company (66.67%)
 Northern Radio Ltd.

El Paso Mojave Pipeline Co.
El Paso Natural Gas Building company
El Paso Natural Gas Clearinghouse Company
El Paso Production Company
Meridian Oil Holding Inc.
Meridian Oil Inc.
Butte Pipe Line Company (10%)
Meridian Oil Pipeline Company
Meridian Oil Trading Inc.
Northern Rockies Pipe Line Co.
Portal Pipe Line Company (50%)
Meridian Oil Production Inc.
EPX Company
Meridian Oil Services Inc.

M-R Holdings Inc.

M-R Holdings Acquisition Company

M-R Holdings Inc. No. 1 (Through No. 7)

Southland Royalty Company
 Southland Gathering Company
 Southland Pipeline Company
 SRC Production Company
 SRC Realty Company

The El Paso Company

El Paso Natural Gas Company (98.49%)
 BEM Holding Corporation
 El Paso Del Peru Company
 El Paso Development Company
 Ex-Mission Ranches, Inc.
 Windjammer, Inc.
 El Paso Gas Marketing Co.
 El Paso Hydrocarbons Company
 El Paso Frontera Corporation
 El Paso Gas Transportation Company
 El Paso Hydrocarbons Gas Processing Company
 El Paso Hydrocarbons NGL Company
 El Paso Hydrocarbons Pipeline Company
 El Paso Hydrocarbons Service Company
 El Paso Hydrocarbons Transportation Company
 El Paso Storage Company
 West Lake Natural Gasoline Co.
 Odessa Natural Gasoline Co.
 Odessa Pipeline Company
 Pecos Company
 Trebol Drilling Company

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In The
Supreme Court of the United States
October Term, 1986

BRONSON C. LA FOLLETTE,
Attorney General of Wisconsin,

Petitioner,

v.

BURLINGTON NORTHERN RAILROAD COMPANY
and BURLINGTON NORTHERN DOCK
CORPORATION,

Respondents.

On Petition for Writ of Certiorari to
the Supreme Court of the State of Wisconsin

BRIEF OF RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

The Respondents do not take issue with the Petitioner's Statement of the Case except in one respect.

Petitioner states that the taconite pellets which are the subject of the tax at issue are "stored at the docks until they can be loaded onto barges for shipment...."

Petition, p. 9. This is only partially accurate. The record indicates that some of the pellets were in fact transported by conveyors directly from Burlington Northern's rail cars to waiting barges, where they were immediately shipped to non-Wisconsin destinations. See Memorandum Opinion of the Douglas County Circuit Court, reprinted at Petitioner's Appendix, Vol. II, pp. 159, 167-168.

Respondents submit in any event that this fact is irrelevant to the Question Presented for Review.

REASONS FOR DENYING THE WRIT

I. THIS CASE LACKS ANY "SPECIAL AND IMPORTANT" REASON FOR GRANTING CERTIORARI

Rule 17.1 of this Court provides that a review on writ of certiorari is not a matter of right and will be granted "only when there are special and important reasons therefor." No such reasons exist in this case.

A. The Case Has Little If Any Practical Significance Beyond The Determination Of Respondents' Tax Liability For Past Years.

The trial court in this proceeding found that the exemption for ore mine within the State of Wisconsin which was contained in Wis. Stat. §70.40 as in effect for the years 1977 through 1980, discriminated against non-Wisconsin ore. See Memorandum Opinion of the Douglas County Circuit Court, reprinted at Petitioner's Appendix, Vol. II, pp. 159, 188-189. The finding was upheld by the Wis. Stat §70.40 Wisconsin Supreme Court, which concluded that the Wisc. Stat. §70.40 was thereby invalid under the "discrimination" prong of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1971). See Opinion of the Wisconsin Supreme Court, reprinted at Petitioner's Appendix, Vol. I, pp. 101, 123-124. During the pendency of the appeal to the Wisconsin Supreme Court, the Wisconsin legislature eliminated the offending exemption

on a prospective basis. 1985 Wis. Act 29 §§1216b & 1216d, reprinted at Petitioner's Appendix, Vol. II, p. 205.

At this point, therefore, the instant case has no practical significance beyond the determination of Respondents' Wisconsin tax liability through December 31, 1986. No other taxpayers in Wisconsin are affected. No future years of *these* taxpayers are affected. No other states are affected.¹ This Court, therefore, is being asked to intervene in what is now only a monetary dispute, arising out of a narrow question that is, for the future, moot even as between the parties. Under these circumstances, it is respectfully submitted that this Court should deny the Petition.

B. Nor Does The Case Involve Any Conflicts With Other Court Decisions.

Inasmuch as this case involves such a narrow legal issue and since it carries with it such a narrow practical impact, it would be expected that the Petitioner would at least point to some conflict between the decision appealed from and some other state or federal court decision, so as to fall within the guidelines of Supreme Court Rule 17.1(b) or (c). No such conflict is presented. Instead, the Petitioner argues only (i) that the tax "scheme" was so important to the State of Wisconsin and the City of Superior that it should be "encouraged" and not "invalidated" (Petition, pp. 14-16), (ii) that the Wisconsin Supreme Court allegedly overlooked and misconstrued some facts in the record (Petition, pp. 16-25) and (iii) that the State Supreme Court allegedly went beyond existing case law in concluding that a discriminatory purpose was sufficient to invalidate a tax (Petition, pp. 25-29).² None of these contentions, even if

¹ Petitioner has not identified a comparable statutory pattern in any other jurisdiction than Wisconsin.

² Significantly, even on this latter point, the Petitioner's argument is only that no other court has invalidated a tax based solely on a discriminatory legislative purpose and Petitioner

(Footnote continued on the following page)

true, present a reason as to why this Court should grant the Petition.

II. IN ANY EVENT, THE DECISION OF THE WISCONSIN SUPREME COURT WAS CORRECT

The true basis of the Petition is, therefore, that the Wisconsin Supreme Court was wrong and two arguments are advanced in support of that conclusion. The Respondents respectfully suggest that, even if the arguments are correct, this Court should deny the Petition because of the limited significance of the case as discussed above. If this Court nevertheless chooses to review the merits of the case, the Petition should still be denied because the decision of the Wisconsin Supreme Court was in fact correct in every respect.

A. The Wisconsin Supreme Court Did Not Overlook Or Misconstrue Facts In The Record.

The Petitioner first argues that the Wisconsin

2 (Continued)

points to no case, state or federal, which holds that a discriminatory purpose is *not* fatal. Thus, even if Petitioner's contentions were correct, they disclose no judicial conflict such as envisioned by Supreme Court Rule 17.1. Furthermore, this argument also ignores the statement of the Wisconsin Supreme Court that its analysis also disclosed a "discriminatory effect on interstate commerce" (emphasis supplied). See Opinion of the Wisconsin Supreme Court, reprinted at Petitioner's Appendix Vol. I, p. 124. The Petitioner argued in its Motion for Reconsideration to the Wisconsin Supreme Court that the Court was wrong on this point, see Defendant-Respondent's Motion for Reconsideration, reprinted at Petitioner's Appendix, Vol. II, pp. 153-154, but the Court denied such Motion, see Order of Wisconsin Supreme Court, reprinted at Petitioner's Appendix, Vol. II, p. 155. The Petitioner is making the same point in its Petition herein but that is a factual matter which is hardly resolvable this Court.

Supreme Court overlooked or misconstrued facts appearing in the record when it concluded that the Wisconsin tax discriminated against non-Wisconsin ore. The Petitioner correctly points out, thus, that no Wisconsin mined ore was actually shipped over Wisconsin ore docks during the years in question, and concludes from this fact that there was in fact no discrimination against interstate commerce within the meaning of the Commerce Clause.

The flaw in this argument is, however, that it assumes that a discriminatory effect can be demonstrated in this case *only* by showing that there was an actual shipment of Wisconsin ore over a Wisconsin dock during the years in question. There are several reasons why this assumption is inaccurate.

As an initial matter, it is apparent that interpreting the "discrimination" prong of *Complete Auto Transit* in this manner would mean that the constitutionality of the Wisconsin law during the years at issue would depend upon whether some Wisconsin competitor chose to ship its ore by rail or boat during those years. As the Supreme Court of Wisconsin stated, however, the applicability of the Commerce Clause cannot be "dependent upon the vicissitudes of business decisions."³ The Petitioner seeks to

³ Opinion of the Wisconsin Supreme Court, reprinted at Petitioner's Appendix, Vol. I, p. 131. Such a test would raise numerous issues, some of them bordering on the absurd. Would, then, the constitutionality or unconstitutionality of the law be determined on an annual basis, so that the tax was invalid in a year in which some (any?) Wisconsin ore *was* shipped over the docks, while remaining valid in a year in which no such shipment took place? Or, conversely, would the shipment of such ore at *any* time invalidate the statute? And, if the latter rule were adopted, would the invalidation then be retroactive to the enactment of the tax or would it be prospective only? Surely, it cannot be the meaning of *Complete Auto Transit* and the other cited cases that serious constitutional issues such as herein involved are built upon such a transitory foundation.

meet this argument by pointing out that the exemption for Wisconsin ore was eliminated by the legislature in 1985 but there is no precedent which holds that an unconstitutional provision can be cured retroactively by a later statute, particularly one which is by its terms prospective in application. Moreover, the Petitioner's argument overlooks the potential impact of such a holding on other discriminatory statutes in Wisconsin and elsewhere and also ignores the possibility that, faced with a judicial decision that the exemption was permissible, the Wisconsin legislature could reinstate the discriminatory provision at any time. Therefore, the true meaning of the "discrimination" prong must be that a discriminatory effect, at least in some circumstances, can be *assumed* from the face of a patently discriminatory statute, and it is on this principle that the Wisconsin Supreme Court must have based its conclusions herein.⁴ Therefore, unless this Court were to find that such an assumption is never justified, it should defer to the conclusions reached in the courts below.

Moreover, the cases cited by the Petitioner do not support his argument. In neither *Complete Auto Transit* nor *Washington Rev. Dept. v. Stevedoring Ass'n*, 435 U.S. 734 (1978) was the tax in question discriminatory in any manner and, thus, those cases have no bearing on the question of what must be shown to prove an unconstitutional discrimination. Further, in the cited cases which do involve discriminatory statutes, the Petitioner's out-of-context quotations do not accurately reflect the actual holdings of those cases. For example, in *Maryland v. Louisiana*, 451 U.S. 729 (1981), the Court noted that the tax was discrim-

⁴ For example, the Wisconsin Supreme Court could well have concluded that the patently discriminatory tax at issue would have had some impact on business decisions made during the years the exemption was in place, such as decisions with respect to investments in Wisconsin versus Minnesota mines.

inatory "on its face"⁵, which had the "obvious economic effect" of encouraging local investors;⁶ this by itself was sufficient to invalidate the tax because, while it "may be true that further hearings would be required to provide a precise determination of the extent of the discrimination"⁷, this was an "insufficient reason"⁸ for "not now declaring the tax unconstitutional."⁹ And see similarly *Boston Stock Exchange v. State Tax Comm'n.* 429 U.S. 318, 334n (1977), holding that a tax penalty for trading on an out-of-state stock market would be *per se* invalid whether or not the penalty was shown to have actually dissuaded any particular investors from making out-of-state trades.

In summary, then, the Supreme Court of Wisconsin concluded that the statute in question had a discriminatory effect whether or not, in any particular year, any Wisconsin ore was actually shipped over a Wisconsin dock. There is nothing in the record nor in the prior decisions of this Court which requires that that conclusion be overturned.¹⁰

⁵ 451 U.S. at 756.

⁶ *Id.* at 757.

⁷ *Id.* at 759.

⁸ *Id.* at 760.

⁹ *Id.*

¹⁰ The Petitioner also argues that it is somehow relevant to this case that, during the years in question, the only producer of Wisconsin ore (Jackson County Iron Company) had a common parent corporation (Inland Steel Corporation) with one of the Minnesota mining companies (Butler Taconite Company). This argument too, however, would make a constitutional conclusion depend upon the "vicissitude of business decisions." Thus, if this argument were accepted, would the Wisconsin tax then become invalid if and when Inland Steel relinquished all or part of its interest in Butler Taconite or in Jackson County Iron? What

(Footnote continued on the following page)

B. The Wisconsin Supreme Court did not improperly consider the legislative purpose behind the tax at issue.

The Petitioner's final argument is that the Wisconsin Supreme Court erred in relying on the discriminatory purpose of the legislature in enacting the tax. Here too, however, there are several fatal flaws in this argument.

For one thing, the Court, in invalidating the Wisconsin tax, did *not* rely solely on the legislature's purpose in enacting the tax. Rather, it merely considered that purpose as a factor in reaching its conclusion that the tax, being discriminatory on its face, was invalid. Opinion of the Wisconsin Supreme Court, reprinted at Petitioner's Appendix, Vol. I, pp. 124-126, 130.

Moreover, this Court noted in the *Complete Auto Transit* case that a tax which is "tailored" to reach only interstate commerce must receive particularly careful scrutiny by the courts. 430 U.S. at 288 n.15. In this case it is undisputed that the State of Wisconsin intended to tax only ore moving in interstate commerce and that it fully recognized and intended that the tax would in fact be paid only by one taxpayer (that is, Burlington Northern). Such a law is exactly the type of "tailored" tax which requires the close scrutiny of the courts and the Wisconsin Supreme Court acted properly in determining that this legislative purpose was a relevant factor for it to consider.

Finally, there is significant precedential support for the conclusion that a legislative intent to favor local commerce is sufficient in itself to invalidate a patently discriminatory statute. For example, in *Bacchus Imports*,

10 (Continued)

would happen to the law if other (independent) producers began to produce Wisconsin taconite? And what about non-Wisconsin producers who do *not* have Wisconsin mines or affiliates? Here again, constitutional principles are not built upon such transitory foundations.

Ltd. v. Dias, 408 U.S. 263 (1984), this court held that state tax legislation may be discriminatory on the basis of either purpose or effect; although the Petitioner argues that the Court did not really mean this (since the *Bacchus* record demonstrated a minor direct competitive effect), it remains that this Court did in fact so hold. *See also Armco, Inc. v. Hardesty*, 467 U.S. 638. The Petitioner attempts to distinguish *Armco* by arguing that, in that case, the Court found an "obvious" burden: in fact, however, the Court in *Armco* found no actual burden on the taxpayer other than the "obvious burden" created by a statute that "on its face" discriminates against interstate commerce. *Id.* at 644. That was sufficient to invalidate the tax and a similar conclusion is required in the instant case.

CONCLUSION

For the above reasons, the Court is respectfully requested to deny the Petition for Writ of Certiorari.

Respectfully submitted,
this 11th day of
December, 1986

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